Supreme Court, U.S.
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No. _____

In The
Supreme Court
Of The
United States

October Term, 1998

STATE OF WASHINGTON,

Petitioner,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent Indian tribes claim rights to harvest shellfish outside their reservations based on treaties securing a "*right of taking fish at all usual and accustomed grounds and stations...Provided, however, That, [the Indians] shall not take shell fish from any beds staked or cultivated by citizens.*" At treaty time, Indians harvested a variety of shellfish from natural beds on tidelands and along shorelines, but there was virtually no harvest of deep water shellfish, such as crab or shrimp, found on deep permanently submerged lands. After the treaties, Washington entered the union on an equal footing with other states, took title to the beds and shores of its navigable waters, and sold and leased tidelands to private individuals who received title to land and embedded shellfish. This case presents two questions:

1. Whether there is a treaty right to take half of an off reservation natural resource, such as deep water shellfish, where Indians did not take that resource at treaty time and where there was no historic dependence on that resource that would support an equitable allocation.

2. Whether, consistent with the treaty prohibition against taking shellfish from any beds staked or cultivated and the State's equal footing title and powers, tribes have any right to take shellfish from private tidelands or cultivated tidelands.

LIST OF PARTIES

The parties to the proceeding below were:

Petitioner: The State of Washington was the defendant/ appellant below.

Respondents Aligned With The State Of Washington: Four separate groups of private property owners and lessees intervened in the case and were aligned as defendants/ appellants below, including:

1. Puget Sound Shellfish Growers Association ("Growers"), intervenor defendants/appellants below, consists of Taylor United, Inc.; Olympia Oyster Company; G.R. Clam & Oyster Farm; Cedric E. Lindsay; Minterbrook Oyster Company; Charles and Willa Murray; Skookum Bay Oyster Company; and J & G Gunstone Clams, Inc.

2. Larry B. and Shirlee Alexander, Harold E. and Billie B. Bauer, James and Ann Carter, William J. and Jeanette Chase, Mrs. Frances A. Fellows, George L. Grader, Earl D. and Millicent Ann Hunsperger, Edward B. And Eleanor J. Krenz, H.J. Merrick, Gordon W. Moss, Sewall L. and Emma M. Reynolds, John D. Riach, Alva Hazel B. Robb, Irene D. Smith, and Providence Worley.

3. William and Charmond Adkins, Grace Boyd, Pierce W. and May H. Davis, Ms. Rosemary Duncan, James E. Hadley, James C. and Sarah H. Johnston, William and Jo Ann Kirsh, David A. Mitchell, Mr. Louis Nawrot, Robert and Sandra Stevenson, and Boon Ho Woo.

4. "26 Tideland and Upland Private Property Owners of Washington", Dan Buehler, Robert L. Davis, Bruce I. Fielding, Arthur J. Gerdes, Joe Hotts, Keith C. Heutson,

Commander John C. James, Richard Sayre Koch, Elaine C. Lefler, Joan Lemonds-Roush, John S. Lewis, Steven L. Luke, Edwards R. McMillan, Robert F. Newman, Mark A. Hysether, Arthur I. Price, Ray D. Randall, Cynthia Rasmussen, Robert G. Shanks, Axel Strakejahn, Leana Tracy, Stuart W. Turner, George B. Usnick, Lee S. Vincent, Joan Walker, and William E. Whitney, Jr.

Respondents: The plaintiffs, who were appellees/cross-appellants below, are The United States of America and the following Indian tribes: Muckleshoot; Nooksack; Upper Skagit; Squaxin Island; Lummi; Makah; Tulalip; Swinomish; Quileute; Puyallup; Hoh; Suquamish; Quinault; Confederated Tribes & Bands of the Yakima Indian Nation; Nisqually; Jamestown S'Klallam; Lower Elwha S'Klallam; Port Gamble S'Klallam; Skokomish; Sauk-Suiattle; and Stillaguamish.

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PETITION FOR WRIT OF CERTIORARI

The State of Washington respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.[1]

OPINIONS AND JUDGMENTS BELOW

The Ninth Circuit opinion superseding and amending its original opinion, denying rehearing, and rejecting the suggestion for rehearing en banc is reported at 157 F.3d 630 (App. at 1-49). The opinions of the district court (W.D. Wash.) are reported at 873 F. Supp. 1422 (1994) (App. at 51-93), 898 F. Supp. 1453 (1995) (App. at 95-134), and 909 F. Supp. 767 (1995) (App. at 135-148).

JURISDICTION

The Court of Appeals filed its opinion on January 28, 1998. App. at 4. All the parties filed timely petitions for rehearing. On September 25, 1998, the Court of Appeals amended its opinion on rehearing and rejected the suggestions for rehearing en banc. App. at 4. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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[1] Shellfish growers and other private tideland and upland owners who intervened in this case have also filed Petitions For A Writ Of Certiorari. *See Puget Sound Shellfish Growers v. United States of America, et al.*, No. 98-_____; *Larry B. and Shirlee Alexander, et al., and William and Charmond Adkins, et al. v. United States of America, et al.*, No. 98-_____; *26 Tideland and Upland Private Property Owners ("UPOW") v. United States of America, et al.*, No. 98-_____.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case concerns language in five Indian treaties that secured "the right of taking fish, at all usual and accustomed grounds and stations . . . *Provided, however*, That [the Indians] shall not take shell fish from any beds staked or cultivated by citizens". The five treaties are: Treaty of Medicine Creek, 10 Stat. 1132 (1855) (App. at 169-76); Treaty of Point Elliott, 12 Stat. 927 (1859) (App. at 177-86); Treaty of Point No Point, 12 Stat. 933 (1859) (App. at 187-94); Treaty with the Makah (Treaty of Neah Bay), 12 Stat. 939 (1859) (App. at 195-201); and the Treaty with the Qui-nai-elts (Treaty of Olympia), 12 Stat. 971 (1859) (App. at 203-09).[2]

STATEMENT

Respondent Indian tribes claim treaty rights to take shellfish from the deep waters and submerged beds of Puget Sound and the Pacific Ocean, and from the extensive tidelands of Washington. When Indians executed these treaties in the 1850s, they did not venture into deep waters to take shellfish, and, although treaty time Indians harvested many shellfish from natural beds on the tidelands, they agreed to take no shellfish from any beds that the influx of settlers would "stake or cultivate". The Ninth Circuit rulings on the tribal claim presents important questions of law and equity.

First, the Ninth Circuit decision conflicts with prior decisions by this Court and other circuits holding that the species, places, and practices secured by treaty are defined and

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[2] The critical provisions of the treaties are substantially similar. For ease of reference, we will cite to the Treaty of Medicine Creek, 10 Stat. 1132 (1855) (App. at 169-76).

limited by the customs and practices of treaty-time Indians. The Ninth Circuit ruled that these treaties now reserve rights that Indians at treaty time did not exercise or even imagine. The tribes thus gained an allocation of valuable "deep water shellfish" fisheries which had developed as recently as the 1980s. The Ninth Circuit has changed rules for treaty interpretation and declared an absolute right to take half of all fish. This ruling displaces the people who pioneered these fisheries and the state's conservation and economic policies.

Second, the Ninth Circuit ruling affects the property interests of thousands of tideland owners and lessees. The Ninth Circuit has ruled that tribes may have rights to take shellfish from virtually any tidelands, including most private shellfish farms and beaches. Since statehood in 1889, Washington has sold or leased approximately half of its tidelands for private use, allowing its citizens to develop some of the finest shellfish farms in the world. The Ninth Circuit interpretation of the treaty interferes with over a century of sales, leasing, cultivation, and private use of shellfish beaches, and places a cloud on thousands of parcels of private property.

A. The Treaties

In 1854 and 1855, the United States negotiated treaties with Indians in the Washington and Oregon Territories. "The principal purposes of the treaties were to extinguish Indian claims to the land in Washington Territory and provide for peaceful and compatible coexistence of Indians and non-Indians in the area." *United States v. Washington* (*Washington* I), 384 F. Supp. 312, 355 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). Each treaty ceded "all [Indian] right, title, and interest in and to the lands and country occupied by them". Treaty of Medicine Creek, art. I, App. at 169. Specific land was set apart as reservations,

and the United States paid annuities and provided education and training. *Id.* at art. II, art. IV; App. at 170, 171. The treaties also provided for a right outside reservation boundaries:

> "The right of taking fish, *at all usual and accustomed grounds and stations*, is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however, That they shall not take shell fish from any beds staked or cultivated by citizens*[.]" Treaty of Medicine Creek, art. III, App. at 170 (emphasis added).

This "right of taking fish" is qualified. It is limited to "usual and accustomed grounds and stations", a phrase that refers to treaty time places and fishing. Shellfish gathering is further limited by the Shellfish Proviso which prohibits taking "shell fish from any beds staked or cultivated by citizens". Thus, the tribes' treaty right includes "taking [shell]fish, at all usual and accustomed grounds and stations" except for shellfish beds that are "staked or cultivated by citizens".

B. Shellfish In Washington

Tribes claimed half of all "shellfish" using a broad term to describe all marine mollusks, crustaceans, and creatures otherwise not described as fish or mammal. *United States v. Washington* (*Shellfish* I), 873 F. Supp. 1422, 1427 (W.D. Wash. 1994), App. at 52. These shellfish differ from anadromous fish such as salmon, which hatch in fresh water, migrate to the ocean where they reach mature size, and then return to fresh-water in predictable annual runs.

Deep water shellfish include crab, shrimp, sea urchin, and other animals that live on or in permanently submerged

lands up to hundreds of feet below the line of extreme low tide. Intertidal shellfish include clams, oysters, mussels, and other animals on beaches and tideflats that are exposed twice daily by the tides. Washington has extreme tidal fluctuations and extensive shorelines, which create thousands of acres of tidelands and shellfish beds. Shellfish are often immobile, such as embedded clams, or live on the ocean floor, like crab. Others swim in deep water, like squid and shrimp.

1. Tribal Harvest Of Shellfish At Treaty Time

Indians at treaty time harvested a wide variety of intertidal shellfish and made substantial use of the clams, oysters, and mussels available on extensive tideflats and shorelines. Minimal numbers of crab, urchins, and "deep water" animals were occasionally available to Indians using the shorelines. The evidence presented at trial established that over ninety-nine percent of crab, urchins, shrimp, and other species of "deep water shellfish" are taken from deep beds and waters, where Indians did not, or could not, take shellfish in the 1850s.[3] ER at 955-57, 965-73; SSER 31.

2. Modern Shellfish Harvesting

On many public tidelands, there are shellfish beds where tribes take up to half the shellfish, and the general public also takes shellfish. Some state tidelands are leased for private uses, including shellfish farming. On private tidelands, shellfish beds are real property and may be planted or improved for commercial or non-commercial purpose.

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[3] The trial court and Ninth Circuit ruled that it did not matter where different species of shellfish were taken at treaty time (*United States v. Washington* (*Shellfish* III), 157 F.3d 630, 644, App. at 19) and therefore did not resolve unique exceptions, like the Makah tribe's proof of treaty time kelp lines or breath-hold diving for sea urchins. ER at 450; SSER at 793.

Except for minimal treaty time harvests along shallows and tidelands, deep water shellfish fisheries were discovered and developed long after treaty time. ER at 400-03, 452, 482-83. Deep water shellfish are now important fisheries. For example, dungeness crab in deep waters are taken primarily by modern crab fleets using three-foot steel frame traps weighing 60 to 120 pounds at depths up to 400 feet (and in "sport" crab seasons open to all). ER at 1127, 1133, 1136. Shrimpers use steel mesh traps at depths of 200 to 300 feet. Since 1940, annual crab landings are 1 to 3 million pounds from Puget Sound and 3 to 20 million pounds from ocean waters. ER at 1137-38.

Since the recent invention of scuba, divers have discovered fisheries for urchins, scallops, sea cucumbers, and giant geoduck (pronounced "gooey-duck") clams. Individual divers and the state invested money to develop these previously unused fishery resources. For example, since the late 1960s, the state has mapped and surveyed all the geoduck beds on its submerged lands. The state program conserved the resource and produced over $10 million dollars in annual revenue. ER at 577-79, 1207-30.

C. Private Ownership And Use Of Tidelands

Since treaty time, both the territorial and state governments have permitted the private occupation of tidelands. In 1863, the territorial government allowed people to occupy up to 10 acres of tidelands for planting oysters. In 1864, it permitted exclusive private use of natural oyster beds in south Puget Sound. *See Shellfish* I, 873 F. Supp. at 1433, App. at 62-63. In 1879, a person could obtain permission to claim 10 acres of oyster beds. *Id.* at 1440, App. at 75.

In 1889, Washington entered the Union "on an equal footing with the original States". 25 Stat. 676, 679, App. at 150. The Washington Constitution asserts ownership of "the

beds and shores of all navigable waters" (Wash. Const. art. XVII, § 1, App. at 152) and directs the legislature to plat and sell tidelands within two miles of each city. Wash. Const. art. XV, § 1, App. at 151. The Legislature often sold tidelands for shellfish purposes and "for commerce, trade or business". *E.g.*, 1895 Wash. Laws, ch. 178 §§ 54, 62; 1889-90 Wash. Laws, at 431. The Legislature also authorized leasing tidelands for shellfish cultivation. *E.g.*, 1899 Wash. Laws, ch. 136, §§ 1, 3, 5.

Two years after statehood, the Washington Supreme Court affirmed that the state had "full power to dispose of [tidelands], subject to no restrictions". *Eisenbach v. Hatfield*, 2 Wash. 236, 245, 26 P. 539 (1891). The Court also held that the state could lease tidelands for shellfish cultivation and that the embedded shellfish were part of the real property under Washington law. *Sequim Bay Canning Co. v. Bugge*, 49 Wash. 127, 131, 94 P. 922 (1908). Today, approximately half of all tidelands are owned or leased by private parties. These private lands are used for shellfish farming, residences, industry, and commerce.

D. Course Of Proceedings

1. The Original Salmon Case Framework For Reviewing Proof Of Treaty Time Salmon Harvests

In 1970, the United States brought suit against Washington to establish treaty rights to salmon and steelhead (anadromous fish) runs. In *United States v. Washington* (*Washington* I), 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976), the district court ordered that fifty percent of the

harvestable anadromous fish runs at usual and accustomed grounds and stations would be allocated to tribes.

The court based its decision on each tribe's treaty time salmon fishing. The court held that the "words 'usual and accustomed' were probably used in their restrictive sense, not intending to include sites where salmon fishing was occasional or incidental". *Washington* I, 384 F. Supp. at 356. The court required the tribes to come forward with evidence of what fish were taken at treaty time and from where. Based on this evidence, it entered detailed findings of fact for each tribe's treaty time fishing to determine where treaty salmon fishing could continue today. *Id.* 359-82.

In *Washington v. Washington State Commercial Passenger Fishing Vessel Association* (*Fishing Vessel*), 443 U.S. 658 (1979), this Court affirmed, but only after reviewing exhaustive evidence that Indians "previously exercised" (*id.* at 678) a right to take salmon and "were heavily dependent upon anadromous fish for their subsistence". *Id.* at 665 n.6. The Court also ruled that the fifty percent allocation of anadromous fish runs was equitable because at treaty time the Indians "depended heavily on anadromous fish as a source of food, commerce, and cultural cohesion". *Id.* at 686.

2. In Paragraph G, The District Court Maintained Continuing Jurisdiction To Review Proof Of Treaty Time Shellfish Harvests

Washington I was expressly limited to anadromous fish. 384 F. Supp. at 400. The district court maintained continuing jurisdiction to determine off-reservation rights to shellfish and nonanadromous fish. *United States v. Washington* (*Washington* II), 459 F. Supp. 1020 (W.D. Wash. 1978). In "Paragraph G" of an "Order For Program To Implement

Interim Plan", the district court required tribes to come forward with "prima facie evidence" to support an off-reservation treaty right to nonanadromous fish and shellfish. To establish this treaty right, the district court required evidence of the "**species taken at treaty times, where (usual and accustomed grounds), and by what tribes (who are entitled to exercise treaty entitlement)**[.]" *Washington* II, 459 F. Supp. at 1038 (emphasis added).

3. Trial Court Proceedings For Off-Reservation Treaty Right To Shellfish

The case at bar began in 1989 when Respondent Tribes sought a determination, citing Paragraph G, of their treaty right to harvest shellfish outside reservations. Private parties intervened because the tribes claim the right to enter their tidelands and take shellfish they owned. In 1993, the United States appeared in support of tribal positions.

With regard to deep water shellfish, the court initially ruled that tribes must come forward with evidence of what species they took at treaty time and where.[4] After trial, however, the court concluded that evidence of historic use or non-use was immaterial because at treaty time "the Tribes had the absolute right to harvest any species they desired, consistent with their aboriginal title". *Shellfish* I, 873 F. Supp. at 1430, App. at 57. The court reasoned that "because the right to take any species, without limit, pre-existed the Stevens Treaties, the Court must read the 'right of taking fish' without any species limitation". *Shellfish* I, 873 F. Supp. at 1430, App. at 57. All harvestable shellfish on salmon fishing grounds were

[4] App. at 161 (Order Clarifying Prior Order Denying Summary Judgment Re Certain Species And Deep-Water Harvest); App. at 153 (Order Denying Summary Judgment Re Certain Species And Deep-Water Harvest).

allocated 50:50 between treaty tribes and other harvesters. *Id.*, App. at 58.

The district court accepted tribal arguments that the Shellfish Proviso did not protect all private land or cultivation, but protected only completely "artificial beds" created where there was never a "natural bed". *Id.* at 1441, App. at 78. Tribes could therefore harvest private and cultivated beds if a natural bed ever existed on that site. The court relied largely on the tribes' reconstruction "state-by-state [of the] legal landscape governing the shellfish industry". *Id.*. at 1432, App. at 61. The court concluded that "the shellfishing laws [of East Coast states] almost universally prohibited the 'staking' or 'cultivating' of natural shellfish beds". *Id.* The court assumed that "United States treaty negotiators were generally familiar with the East Coast shellfish industry and its practices" and applied the narrowest legal terms and policies of those eastern states. *Id.* at 1434, App. at 65. The court expressly rejected any duty to interpret the Shellfish Proviso in light of the Equal Footing Doctrine which presumes that every new state enters the Union free of any encumbrances on its tidelands and submerged lands so it stands on equal footing with the other states. *E.g., Shively v. Bowlby*, 152 U.S. 1 (1894); *Shellfish* I, 873 F. Supp. at 1443-44, App. at 80-81.

4. Ruling By The Ninth Circuit Court Of Appeals

On appeal, the Ninth Circuit adopted the district court's reasoning, that proof of treaty time deep water shellfish gathering was not required because the tribes reserved rights to do anything they theoretically had the right to do at treaty time. *United States v. Washington* (*Shellfish* III), 157 F.3d 630, 644 (9th Cir. 1998), App. at 19-20. Without addressing Paragraph G, it said that the law of the case was that "courts considering

fishing disputes under the Treaties have never required species-specific findings of usual and accustomed fishing grounds". *Shellfish* III, 157 F.3d at 644, App. at 19-20. It applied the fifty percent allocation to deep water shellfish and did not discuss the equitable factors for allocation identified in *Fishing Vessel* (443 U.S. at 686) except to address briefly the moderate living factor. *Shellfish* III, 157 F.2d at 652, App. at 33.

The Ninth Circuit also affirmed that the Shellfish Proviso refers only to beds cultivated or planted by private citizens where no natural bed existed. *Id.* at 647-49, App. at 25-28. The Ninth Circuit deferred to the district court's conclusion that the Shellfish Proviso incorporated East Coast shellfish law of the 1850s. "Given the deferential standard by which we review the district court's findings of historical fact and its findings regarding the intentions of the parties' negotiators, we conclude the district court did not err in interpreting the Proviso and we adopt its analysis as our own". *Id.* at 648, App. at 26. It adopted the district court's reasoning that the Equal Footing Doctrine does not apply to reserved treaty rights and applies only to fee simple ownership of tidelands. *Id.* at 645, App. at 20-23.

Finally, the Ninth Circuit ruled that tribes were not entitled to fifty percent of a grower's total crop, only fifty percent of what the natural harvest of the bed would have been in the absence of cultivation and enhancement. The shellfish growers, however, had the burden to "demonstrate what portion of their harvest is due to their labor, as opposed to what portion would exist absent the Growers' enhancement". *Id.* at 652-53, App. at 34.

Judge Beezer concurred in the decision reluctantly, feeling bound by law of the case. Judge Beezer believed that the claimed treaty shellfish rights "strain[ed] even the

deferential canons of Indian treaty interpretations". *Shellfish* III, 157 F.3d at 657, App. at 43. He felt bound by Supreme Court precedent, which he labeled "perplexing". *Id.*

REASONS FOR GRANTING THE PETITION

The Court should grant review because the Ninth Circuit's decision conflicts with fundamental rules of treaty interpretation established by this Court and followed by other courts. These rules for treaty interpretation have implications in this case, for ocean fisheries of the Pacific Ocean, and for any other treaty claim to natural resources. Moreover, as the Ninth Circuit recognized, the decision has an "enormous impact" on "thousands of homeowners, Tribal members, and commercial fishermen in the Puget Sound region" and the Washington coast. *Shellfish* III, 157 F.3d at 657, App. at 42.

A. Granting Tribes A Treaty Right To Deep Water Shellfish, That Were Not Taken At Treaty Time, Conflicts With Decisions Requiring Proof Of Treaty Time Activities

For nearly a century, in this Court and among the circuits, the species, places, and activities secured by treaty rights have depended on proof of treaty time activity.[5] This doctrine is at the heart of Indian Law jurisprudence and ensures that judicial definition of treaty rights matches what Indian signatories contemplated. Further, this doctrine ensures that

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[5] Felix S. Cohen, *Handbook of Federal Indian Law* ch. 8, § B.1, at 446 (1982 ed.) ("Courts have generally taken the approach that the 'right to fish' includes the right to harvest those species of fish that were taken by the Indians at the time the treaty was negotiated, as shown by historical and anthropological evidence.").

the preemption of state powers is tailored to meet the treaty time purposes of the federal government.

The Ninth Circuit decision conflicts with this fundamental principle. It adopts the district court's erroneous ruling that Indian aboriginal title was a collection of theoretically unlimited rights and that treaties, therefore, secured rights not previously exercised or even imagined:

> "The fact that some species were not taken before treaty time—either because they were inaccessible or the Indians chose not to take them—does not mean that their **right** to take such fish was limited." *Shellfish* III, 157 F.3d at 644 (emphasis added) (quoting 873 F. Supp. at 1430), App. at 19.

Based on this analysis, the Ninth Circuit concluded that the tribes had a treaty right to take deep water shellfish, even though evidence presented at trial showed that Indians had no customary shellfish harvests from deep water at treaty time. That conclusion is wrong and conflicts with decisions of this Court and other circuit and district courts.

1. The Ninth Circuit's Opinion Conflicts In Principle With Prior Decisions Of This Court Requiring Proof Of Treaty Time Activity

In *Fishing Vessel*, this Court considered the treaty right to take salmon and other anadromous fish under these same treaties. The Court did not define the scope of the treaty rights based on the platonic notions about aboriginal title. Instead, the Court focused on rights "previously exercised" by the signatory Indians, stating:

> "The fishing clause speaks of 'securing' certain fishing rights, a term the Court has previously interpreted as synonymous with 'reserving' rights previous exercised". *Fishing Vessel*, 443 U.S. at 678.

The central holding of *Fishing Vessel*, that the treaties secure more than an opportunity to fish in common with other citizens, was grounded in the Indian understanding that they could continue specific treaty time fishing activities. The Court relied on the fact that the tribes "were heavily dependent upon anadromous fish for their subsistence and for trade with other tribes and later with the settlers". *Fishing Vessel*, 443 U.S. at 665 n.6. The Court also pointed to records of the negotiations to establish that the Indians understood that the treaties secured specific places and species being used by the signatory Indians.

> "[T]he United States negotiators promised, and the Indians understood, that the Yakimas would forever be able **to continue the same off-reservation** food gathering and fishing practices **as to time, place, method, species and extent as they had or were exercising**." *Id.* at 667 (emphasis added) (quoting trial court).

Fishing Vessel followed the Court's prior rulings that historic practices define the exact activity secured by treaty. In *Seufert Brothers Co. v. United States*, 249 U.S. 194 (1919), the question was whether Yakima Indians had a treaty right to fish on the Oregon side of the Columbia River. Once again, the Court did not base its decision on the theoretical ability of the tribe to fish on the Oregon side. The Court defined the treaty right by using well-known historic fishing activities. *Id.* at 198-99. "During all the years since the treaty was signed the [Yakima Indians] have been accustomed habitually to resort for fishing [on the Oregon side]. This shows clearly that their understanding of the treaty was that they had the right to resort to these fishing grounds[.]" *Fishing Vessel*, 249 U.S. at 198-99.

The district courts have looked to evidence of treaty time activity in interpreting other treaties that grant off-reservation treaty hunting and fishing. For example, in *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), *aff'd on other grounds*, 653 F.2d 277 (6th Cir. 1981), the issue was the tribe's right to engage in subsistence and commercial fishing. According to the court, for the "right to exist in the first instance, it must be shown that the Indians were in fact using the resource". *Id.* at 213. "[T]he factual predicate for the reserved fishing right is the documented historic, ethno-historic, anthropologic, and archaeologic evidence proving that commercial and subsistence fishing was of significance to the Indians during treaty times." *Id.* The court then entered detailed findings of fact regarding treaty time fishing activity. *Id.* at 219-225; *see also Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 653 F. Supp. 1420, 1426-29 (W.D. Wis. 1987) (making exhaustive findings about off-reservation hunting, fishing, and gathering activities).

The prior decisions in this case also adhere to the principle that a tribe must establish treaty time activity. In *Washington* I, the original decision adjudicating salmon rights, the district court entered detailed findings of which species of anadromous fish were taken, from where, and by which tribe. *Washington* I, 384 F. Supp. at 359-82. In Paragraph G, the district court explicitly required the same "prima facie evidence" of the "species taken at treaty times, where (usual and accustomed grounds), and by what tribes", before a tribe could exercise an off-reservation right to take different shellfish. *Washington* II, 459 F. Supp. at 1037-38. Thus, the Ninth Circuit was simply wrong in its view that the law of the case did not require "species specific findings of usual and

accustomed fishing grounds". *Shellfish* III, 157 F.3d at 644, App. at 19-20.[6]

2. The Ninth Circuit Decision Directly Conflicts With Decisions That Deny A Treaty Right Based On Failure To Prove Treaty Time Activity

The Ninth Circuit's decision that the treaty secures rights not previously exercised directly conflicts with circuit court and district court decisions that deny treaty rights to a tribe that fails to prove the specific right was exercised at treaty time.

In *United States v. Dion*, 752 F.2d 1261 (8th Cir. 1985) (*en banc*), *reversed in part*, 476 U.S. 734 (1986)[7], the United States prosecuted a tribal member for violating the Eagle Protection Act and the Endangered Species Act by killing and selling bald and golden eagles. The court recognized that the tribe's treaty right to hunt existed and was "not much less necessary to the existence of the Indians than the atmosphere they breathed". *Id.* at 1264. Nevertheless, the Eighth Circuit ruled there was no treaty right to hunt eagles for commercial purposes because the defendant:

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[6] For example, the district court's jurisdiction was invoked pursuant to Paragraph G to determine the treaty right to nonanadromous herring. After considering anthropological evidence the district court concluded that some tribes had established a right to the herring fishery while others had not. *Order On Requests For Determination Re Herring Fisheries*, dated March 28, 1975 (App. at 163-67).

[7] The issue before this Court in *Dion* was whether the Eagle Protection Act abrogated a treaty right to hunt eagles for religious purposes, an activity that occurred at treaty time. The Court concluded that the treaty was abrogated. The tribal member did not contest the court of appeals' ruling that there was no treaty right to hunt eagles for commercial purposes, and that issue was not before this Court. *Dion*, 476 U.S. at 736 n.2.

> "[P]resented no historical evidence of a Yankton Sioux practice of selling parts or carcasses of eagles . . . . We find that the Yankton Sioux would not have understood the treaty as reserving in them a right to sell eagles . . . . Accordingly, the defendants do not have a treaty right to sell such birds." *Dion*, 752 F.2d at 1264; *see also id.* at 1265 n.11.

The Ninth Circuit's decision also conflicts with *United States v. Top Sky*, 547 F.2d 486, 487-88 (9th Cir. 1976). This case also concerned a federal prosecution of a tribal member for selling eagle feathers. The tribes had a treaty right to "hunt on the unoccupied lands of the United States" but, after an evidentiary hearing, the trial court concluded that there was no "historical evidence in the presented case that discloses a pattern of sale of eagle parts". *Id.* at 487. The Ninth Circuit concluded that "it would be contrary to the expectations of the Indians to interpret the 'right to hunt' to include the right to sell eagles commercially". *Id.* at 488.[8]

In the extensive Seventh Circuit litigation by the Lac Courte Oreilles Indians, the court recognized that treaty time Indians "exploited virtually every resource in the ceded territory, including numerous species of trees". *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 758 F. Supp. 1262, 1269 (W.D. Wis. 1991). The tribes argued that such use of trees at treaty time meant that the

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[8] In *United States v. Bresett*, 761 F. Supp. 658 (D. Minn. 1991), the United States prosecuted a tribal member for selling migratory bird feathers in violation of the Migratory Bird Act. The court ruled in favor of the defendant but did not follow the analysis adopted by the Ninth Circuit in this case. Instead, the court distinguished *Dion* and *Top Sky* based on the "direct and circumstantial evidence" that the sale of migratory bird feathers was a treaty time activity.

treaty secured commercial timber cutting. The court relied on the principle that treaty time use defines treaty rights:

> "Ascertaining what the Chippewa were actually doing at the time of the treaties is a prerequisite to determining what they would have understood they were reserving." *Lac Courte Oreilles Band*, 758 F. Supp. at 1270.
>
> "[E]vidence did not show that the Chippewa exploited a timber resource, either for their own use or for commercial purposes. . . . There is no evidence to suggest that at that time the Chippewa would have had the equipment, knowledge and skills necessary to take *timber* from the forest, or that they would have even contemplated doing so." *Id.* at 1270-71.

The decisions by this Court, circuit courts, and district courts demonstrate that treaty meaning and Indian understanding is shown by examining actual treaty time hunting, fishing, or gathering.[9] Here, the lack of treaty time harvest of deep water shellfish confirms that Indians had no contemplation that the treaty secured rights in off-reservation shellfish beds that would be discovered a century later.

The Court should grant certiorari to review the Ninth Circuit's ruling that treaty time fishing is irrelevant to determining the particular locations and types of shellfish that were "usual and accustomed" and secured by treaty right.

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[9] The state has continually emphasized that Indians need not use 1855 technology, but that 1855 fishing does define what places and fish were used by treaty Indians, and therefore what is secured by these treaties.

B. Allocating Half Of Deep Water Shellfish To The Tribes Was Not Equitable And Conflicts With This Court's Rulings On Allocation

The second reason for certiorari is that the Ninth Circuit's ruling creates a rule of automatic 50:50 allocation and conflicts with this Court's guidance on the equities that support allocation of natural resources to treaty Indians. If the Ninth Circuit had followed the analytical steps laid out in *Fishing Vessel*, it would have reversed the 50:50 allocation of deep water shellfish because Indians did not take or depend upon those shellfish resources at treaty time.[10]

Allocation was one of the major issues in *Fishing Vessel*. The district court and Ninth Circuit had based the 50:50 salmon allocation on an analogy to a co-tenancy. Judge Kennedy concurred to criticize the rationale for allocation. *Puget Sound Gillnetters Ass'n v. United States Dist. Ct. for the W. Dist. of Washington*, 573 F.2d 1123, 1136 (9th Cir. 1978) (J. Kennedy, concurring) ("Cotenancy is not synonymous with entitlement to equal shares. Nor does the right of a cotenant to partition provide guidance for an equitable division of fish."). On certiorari, this Court responded to this criticism and ruled that allocation was an equitable remedy and that a showing of historic dependence must precede allocation.

Where there is a treaty right, neither treaty nor non-treaty fishers "may deprive the other of a '**fair share**' of the

---

[10] Allocation also may be an issue for intertidal shellfish, although the question of when tribes have rights on "beds staked or cultivated" should be determined first to identify what intertidal shellfish resource is being allocated. If the resource is identified, then allocation of intertidal resources can apply the *Fishing Vessel* equities. Because Indians historically harvested intertidal shellfish, the primary equitable factor would be whether reasonable livelihood or "moderate living" needs are met.

[resource]". *Fishing Vessel*, 443 U.S. at 684. To set a fair share, a judge must begin by "determining [whether] at the time of the treaties the resource involved was necessary to the Indians' welfare". *Id.* at 685. If the resource involved was necessary to treaty time Indians, then the court can exercise its equitable discretion to "devise some apportionme that assure[s] that the Indians' reasonable livelihood needs [are] met". *Id.*

Fishing Vessel shows that historic dependence is the threshold question for any allocation, and that any allocation should not exceed reasonable livelihood needs:

> "[The trial court] first concluded that at the time the treaties were signed, the Indians, who comprised three-fourths of the territorial population, depended heavily on anadromous fish [salmon] **as a source of food, commerce, and cultural cohesion**. . . . **Only then** did it determine that the Indians' present-day subsistence and commercial needs should be met, subject, of course, to the 50% ceiling." *Id.* at 686 (emphasis added).

The Ninth Circuit here returned to a simplistic ruling that shellfish must be divided 50:50, reasoning that shellfish are part of the same treaty provision that secures salmon rights. The Ninth Circuit did not consider whether treaty time Indians depended on deep water shellfish resources "as a source of food, commerce, and cultural cohesion". *Id.* In stark contrast to this Court's reliance on treaty time dependence to justify the salmon allocations, the Ninth Circuit said that it did not matter that the deep water shellfish were "not taken before treaty time". *Shellfish* III, 157 F.3d at 644, App. at 19.

The equities for deep water shellfish are quite different from salmon. At treaty time, and immediately thereafter, the

Indians dominated the salmon fishery. "Not until major economic developments in canning and processing occurred in the last few years of the 19th century did a significant non-Indian fishery develop." *Fishing Vessel*, 443 U.S. at 668. The opposite is true in this case. The tribes did not take deep water shellfish at treaty time, and these resources were subsequently developed by the state and any interested fisher. No Indians were displaced.[11]

The Ninth Circuit's mechanical application of the 50:50 allocation already reaches beyond this case. United States regulatory agencies cite the Ninth Circuit decision to justify an automatic fifty percent allocation of ocean fisheries to tribes, without any equitable analysis as required by *Fishing Vessel*. *See* 62 Fed. Reg. 700, 718 (Jan. 6, 1997) (1997 Ocean Whiting allocation rejects Pacific Fishery Management Council's recommendation and allocates fifty percent to tribes notwithstanding lack of historic use); 61 Fed. Reg. 28786, 28787-88 (June 6, 1996); 61 Fed. Reg. 279 (Jan. 4, 1996) (dividing all ground fish); *see also Parravano v. Babbitt*, 70 F.3d 539 (9th Cir. 1995), *cert. denied*, 518 U.S. 1016 (1996) (federal rules allocating salmon runs 50:50 to tribe with no off-reservation fishing rights).

As human population and demands outpace natural resources, other courts and agencies will face tribal requests for allocations. Certiorari is needed to provide important guidance and to resolve the conflict between the Ninth Circuit's mechanical allocation and *Fishing Vessel*'s equitable allocation.

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[11] Repeated tribal assertions that broadly proclaim the importance of "shellfish" hide the distinction between heavy treaty time use of intertidal shellfish and the minimal treaty time use or complete non-use of the deep water shellfish fisheries.

C. The Ninth Circuit Interpretation Of Treaty Rights To Take Shellfish From Private Lands And Cultivated Beds Conflicts With Decisions By This Court

The United States obtained a complete cession of all Indian "right, title, and interest" in the lands that would become Washington, at the same time creating an off-reservation shellfish harvesting right limited by the Shellfish Proviso – that Indians shall not "take shell fish" from "any bed" that is "staked or cultivated". There are two conflicts that justify a Writ to review the tension between the tribes' cession and their claimed right to take shellfish on private lands or from cultivated tidelands. First, the Ninth Circuit decision conflicts with decisions of this Court by failing to interpret the treaty in light of the Equal Footing Doctrine. Second, the Ninth Circuit determined the legal meaning of this treaty right by deferring to findings by the trial court about the negotiators' intentions, failing to fulfill its appellate function to declare the legal meaning of the treaty.

1. Rejection Of The Equal Footing Doctrine Conflicts With Decisions Of This Court

The federalism framework presumes that all states enter the Union on an equal footing with the same fundamental powers as other states. Congress explicitly provided that Washington was "on an equal footing with the original States". 25 Stat. at 679, App. at 150.

The Equal Footing Doctrine presumes that during the territorial period, the federal government preserves the future state's title and sovereignty over tidelands and fisheries. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 117 S. Ct. 2028, 2041 (1997) ("The principle which underlies the Equal Footing Doctrine and the strong presumption of state

ownership is that navigable waters uniquely implicate sovereign interests."). Like the Tenth and Eleventh Amendments, the Equal Footing Doctrine preserves the dual sovereignty of federalism. Only a clear and deliberate act by the federal government deprives a state of its title or sovereignty over tidelands and fisheries:

> "[A] court deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption against conveyance by the United States . . . and must not infer such a conveyance 'unless the intention was definitely declared or otherwise made plain,' . . ." *Montana v. United States*, 450 U.S. 544, 552 (1981).

See also Martin v. Waddell, 41 U.S. (16 Pet.) 367, 411 (1842) ("the grant to an individual of an exclusive fishery . . . will not be presumed . . . unless clear and especial words are used to denote it"); *Pollard v. Hagen*, 44 U.S. (3 How.) 212, 230 (1845) (a pre-statehood transfer of the bed of navigable waters would deprive a future state of "a numerous and important class of police powers").

The tribal shellfish right creates rights to cross both tidelands and uplands (subject to judicial conditions). It impairs the property interests of thousands of tideland and upland owners. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (property includes right to determine who crosses private beach); *Sequim Bay Canning Co.*, 49 Wash. at 131 (embedded shellfish are part of real property under Washington law). The Ninth Circuit, however, refused to consider how the treaty right should be examined in light of the Equal Footing Doctrine:

> "'[T]he Supreme Court has applied the Equal Footing Doctrine in one context only, namely when evaluating a

> claim of right to lands beneath navigable waters based upon an alleged conveyance or retention of fee simple ownership by the United States prior to statehood.'" *Shellfish* III, 157 F.3d at 645 (quoting the district court), App. at 21-22.

The Ninth Circuit's narrow focus on conveyances of fee simple ownership shows that the panel misunderstood the Equal Footing Doctrine and the dual sovereignty of federalism.[12] Thus, this case presents the important question of whether the Equal Footing Doctrine applies to treaty rights that would create permanent easements in tidelands depriving the future state of its full power to convey those lands and determine future uses.

The Ninth Circuit ruling conflicts in principle with this Court's ruling that applied the Equal Footing Doctrine to analyze rights created by these very treaties. In *United States v. Winans*, 198 U.S. 371 (1905), the United States argued that these treaties fixed "easements" to "usual and accustomed" fishing sites.[13] After concluding that Indians would have

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[12] The Ninth Circuit is simply wrong when it describes the doctrine as limited to questions of conveyance of fee simple. *See, e.g., City of Cincinnati v. Louisville & Nashville R.R. Co.*, 223 U.S. 390 (1912) (under Equal Footing Doctrine, federal government cannot deny Ohio power of eminent domain); *Coyle v. Smith*, 221 U.S. 559 (1911) (Oklahoma must be given power to locate its seat of government); *Hawkins v. Bleakly*, 243 U.S. 210 (1917) (Iowa must receive power to determine right to jury trial).

[13] The "easement" affirmed in *Winans* is further explained by the subsequent case of *Seufert Brothers Co. v. United States*, 249 U.S. 194 (1919). *Seufert* confirms that the "servitude" memorialized by treaty is not an undefined right of convenience for Indians to enter any private land that leads to any fishing site. The easement "exist[ed] only where there was an habitual and customary use of the premises, which must have been so open and notorious during a considerable portion of each year, that any person . . . must have known of them". *Id.* at 199.

understood that the treaties secured continued access on well known paths to the Columbia River, this Court addressed whether "the state acquired by its admission into the Union 'upon an equal footing with the original states,' the power to grant rights in or to dispose of the shore lands upon navigable streams". Winans, 198 U.S. at 382. The Court held that creating an easement on that path was within Congressional powers and the treaty memorialized the easement in a manner sufficient to overcome equal footing presumptions. *Id.* (citing *Shively v. Bowlby*, 152 U.S. 1 (1894)).

The case at bar, in contrast, presents facts not addressed by *Winans.* Here, the Shellfish Proviso negates the implication that permanent easements are created and demonstrates that the future state's equal footing was not diminished.

The Ninth Circuit offered an alternative reason to avoid equal footing requirements:

> "'Because the Stevens Treaties must be construed as a reservation of rights by the Tribes, not a granting of rights by the United States, the *Shively* presumption and the Equal Footing Doctrine cannot play a role in the evaluating the existence or scope of the rights.'" *Shellfish* III, 157 F.3d at 645 (quoting district court), App. at 21.

This Court has rejected an analogous argument that the Equal Footing Doctrine can be defeated by a new state reserving rights. In *United States v. Texas*, 339 U.S. 707 (1950), Texas contended that it had been an independent country before statehood and had granted only specific rights to the United States. Texas argued that it "reserved" title to its "marginal seas". The Court, however, held that the equal footing framework mandated that the federal government must hold that marginal sea for national purposes. The equal footing

framework could not be avoided by a prestatehood reservation. *See also Idaho*, 117 S. Ct. at 2041 (state sovereignty and title over submerged lands "arises from the equal footing doctrine and is 'conferred not by Congress but by the Constitution itself'") (quoting *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977)).

Nor is the Ninth Circuit ruling consistent with the decision of *Montana v. United States*. To decide if the Crow Tribe reserved an interest in the riverbed crossing its reserved lands, this Court applied the Equal Footing Doctrine.

The Ninth Circuit ruling reflects confusion among circuit courts about how the Equal Footing Doctrine applies to analysis of treaty rights. In *Crow Tribe v. Repsis*, 73 F.3d 982, 991 (10th Cir. 1995), *cert. denied*, 517 U.S. 1221 (1996), the court held that because treaty rights in that case were of a temporary nature, they could not overcome equal footing presumptions and the state therefore had full power to regulate tribal hunting after statehood. *See also Ward v. Race Horse*, 163 U.S. 504, 515 (1896). In contrast, the Eighth Circuit labels the Equal Footing Doctrine as a "defense" and applies a stringent test to determine if Congress intended to abrogate treaty rights at statehood. *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 927, 929 (8th Cir. 1997), *cert. granted*, No. 97-1337 (argued Dec. 2, 1998).

Washington's conservation and economic policies, which designed tideland ownerships and encouraged cultivation, have been preempted without judicial determination that the federal government clearly intended to deny Washington its equal footing rights. Rather than preserving the rights of the future state, the Ninth Circuit makes the Shellfish Proviso a federal mandate that the future state never allow privatization or cultivation of tidelands

inconsistent with the laws and policies of select 1850s states. Washington is thus denied the fundamental power over use and development of shellfish beds that every other state received at statehood. The Shellfish Proviso thus presents an important issue of the federalism framework.

2. The Ninth Circuit Failed To Apply *De Novo* Review To Determine Treaty Meaning

The Ninth Circuit ruled that its interpretation of the treaty was controlled by "the district court's findings of historical fact and its findings regarding the intentions of the parties' negotiators". *Shellfish* III, 157 F.3d at 648, App. at 26. It limited its review of those findings to "clear error". *Id.*, App. at 27.

This Court has explained that where the status of an issue as "fact" or "law" is uncertain, a number of considerations are applied to determine if the appellate court is in a better position to address an issue *de novo*. *Miller v. Fenton*, 474 U.S. 104, 112-17 (1985). For example, *Miller* holds that the voluntariness of a confession is a legal inquiry, despite the factual uniqueness of each confession, because the issue has "a uniquely legal dimension" that examines the compatibility of the confession with the legal system and constitutional presumptions of innocence. *Id.*

The meaning of treaties is even more a question of law where an appellate court must apply its power to fully review all material information to ascertain meaning. *See, e.g.*, *Fishing Vessel*, 443 U.S. at 674-85. Treaty meaning is not a factual determination for a jury. Treaty meaning resolves questions of law and sets the rule of law for all future litigants through stare decisis.

The Ninth Circuit breaks with this precedent by confusing the trial court's "finding" that treaty negotiators knew of East Coast shellfish law with the ultimate question of

law about treaty meaning. Although treaty meaning is often described in terms of the intentions of the parties, this Court has always determined treaty meaning with a thorough and searching review of the record. *E.g., Fishing Vessel.*

The absence of thorough *de novo* review precluded the appeals court from weighing crucial information. First, the constitutional framework of equal footing that the future state should receive unencumbered title and sovereign power over tidelands is a "common notion" of the negotiators. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978) (using "common notions" of the negotiators).

Second, the appeals court should have put minimal weight on technical East Coast legal meanings of "staked" or "cultivated". In the prior salmon case, Washington argued that the fishing right should be interpreted based on intricacies of East Coast common law because there was a lawyer on Isaac Stevens' staff. This Court called the state's argument a "highly dubious assumption". *Fishing Vessel*, 443 U.S. at 677 n.23. A "treaty must . . . be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians". *Id.* at 676 (quoting *Jones v. Meehan*, 175 U.S. 1, 11 (1899)).

Third, the appeals court should have considered the logical context of the Shellfish Proviso. The proviso limits "usual and accustomed" Indian shellfish gathering. However, if the proviso applies only where there was no natural shellfish bed, that site would not be "usual and accustomed". By adding the implied restriction against staking or cultivating a natural bed, the court rewrote the treaty "beyond [its] clear terms to remedy a claimed injustice". *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943). Here, the "claimed injustice" is the denial of Indian access to natural shellfish beds. That limit on

Indian use, however, fits the general cession, the influx of settlers, the subsequent private development, and the plain language.

Most significantly, *de novo* review would have also considered the 135 years of practical construction by the United States, the Indians, the territorial government, the state, and the citizens. The "practical construction adopted by the parties" is an important tool for determining treaty meaning. *Choctaw Nation*, 318 U.S. at 431-32. As the trial court determined, the state sold and leased tidelands with "no notice" that natural beds were somehow subject to permanent tribal claims. *Shellfish* II, 898 F. Supp. at 1457, App. at 97. The 1905 Commissioner of Indian Affairs assumed that sales and privatization were consistent with the proviso. App. at 211-13. Practical construction is especially appropriate here, because the Ninth Circuit's legalistic interpretation makes little sense. It is "difficult – if not impossible" to determine where natural shellfish beds existed prior to cultivation and enhancement by the myriad owners or lessees. *Id.* at 1462, App. at 107.[14]

Thus, this question of treaty rights to shellfish presents important issues about how an appellate court should determine the meaning of treaty language *de novo* by using material information in a well developed record.

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[14] The trial court realized this too late and tried to alter its initial ruling so that any cultivation or enhancement of any bed (natural or not) meant that a bed was "de facto artificial" and therefore protected by the Shellfish Proviso. *Shellfish* II, 898 F. Supp. at 1462, App. at 107. The Ninth Circuit, however, rejected that modification. *Shellfish* III, 157 F.3d at 650 , App. at 30.

D. This Case Affects Thousands Of People And Properties

The Ninth Circuit ruling that these tribes may take half of all shellfish resources in deep waters of Washington State displaces the people that discovered, developed, and relied on those resources for their businesses. Half their fishing opportunity is given to tribes that invested neither money nor time to find and develop these fisheries. State economic and conservation laws that were once efficiently crafted for the public interest must be adjusted to plan, negotiate, and share each fishery with the separate tribes. *Shellfish* II, 898 F. Supp. at 1463-69, App. 108-120.

Further, tens of thousands of owners and lessees occupy about half of Washington's two thousand miles of salt water shoreline. The Ninth Circuit's interpretation requires permanent masters to determine locations of natural beds and set tribal shares where there has been a century of private use, and to hear claims when tribal harvesters damage private property. Certiorari should be granted to determine whether these treaties require judicial supervision of permanent, involuntary co-tenancies between tribes and these thousands of property owners.

CONCLUSION

For all the above reasons, this Court should grant the Petition For Writ Of Certiorari.

Respectfully submitted,

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In The
Supreme Court
Of The
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October Term, 1998

STATE OF WASHINGTON, *Petitioner*,

v.

UNITED STATES OF AMERICA, ET AL., *Respondents*.

PUGET SOUND SHELLFISH GROWERS, *Petitioners*,

v.

UNITED STATES OF AMERICA, ET AL., *Respondents*.

LARRY B. AND SHIRLEE ALEXANDER, ET AL., AND WILLIAM AND CHARMOND ADKINS, ET AL., *Petitioners*,

v.

UNITED STATES OF AMERICA, ET AL., *Respondents*.

26 TIDELAND AND UPLAND PRIVATE PROPERTY OWNERS ("UPOW"), *Petitioners*,

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITIONS FOR A WRIT OF CERTIORARI

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157 F.3d 630

UNITED STATES of America;
Muckleshoot Tribe; Nooksack; Upper Skagit; Squaxin Island;
Lummi Indian Tribe; Makah Tribe; Tulalip Tribe; Swinomish Indian
Tribal Community; Quileute Indian Tribe; Puyallup Tribe; Hoh
Indian Tribe; Suquamish Tribe; Quinault Indian Nation;
Confederated Tribes & Bands of the Yakima Indian Nation;
Nisqually Indian Tribe; Jamestown Tribe; Lower Elwha Klallam
Tribe; Port Gamble Bands; Skokomish Tribe; Sauk-Suiattle Tribe;
Stillaguamish Tribe,
Plaintiffs-Appellees,

v.

STATE OF WASHINGTON,
Defendant-Appellant.

UNITED STATES of America;
Muckleshoot Tribe; Nooksack; Upper Skagit; Squaxin Island;
Lummi Indian Tribe; Makah Tribe; Tulalip Tribe; Swinomish Indian
Tribal Community; Quileute Indian Tribe; Puyallup Tribe; Hoh
Indian Tribe; Suquamish Tribe; Quinault Indian Nation;
Confederated Tribes & Bands of the Yakima Indian Nation;
Nisqually Indian Tribe; Jamestown Tribe; Lower Elwha Klallam
Tribe; Port Gamble Bands; Skokomish Tribe; Sauk-Suiattle Tribe;
Stillaguamish Tribe,
Plaintiffs-Appellees,

v.

STATE OF WASHINGTON, et al.,
Defendants,

and

26 Upland and Tideland Private Property Owners, (Dan Buehler,
Robert L. Davis, Bruce I. Fielding, Arthur J. Gerdes, Joe Hoots,
Keith C. Huetson, Commander J.C. James, Richard Sayre Koch,
Elaine C. Lefler, Joan Lemonds-Roush, John S. Lewis,
Steven L. Luke, Edward R. McMillan, Robert F. Newman, Mark A.
Nysether, Arthur I. Price, Ray D. Randall, Cynthia Ramussen,
Robert G. Shanks, Axel Strakeljahn, Leana Tracy,
Stuart W. Turner, George B. Usnick, Lee S. Vincent, Joan Walker
and William E. Whitney, Jr.),
Defendants-Intervenors-Appellants.

UNITED STATES of America;
Muckleshoot Tribe; Nooksack; Upper Skagit; Squaxin Island; Lummi Indian Tribe; Makah Tribe; Tulalip Tribe; Swinomish Indian Tribal Community; Quileute Indian Tribe; Puyallup Tribe; Hoh Indian Tribe; Suquamish Tribe; Quinault Indian Nation; Confederated Tribes & Bands of the Yakima Indian Nation; Nisqually Indian Tribe; Jamestown Tribe; Lower Elwha Klallam Tribe; Port Gamble Bands; Skokomish Tribe; Sauk-Suiattle Tribe; Stillaguamish Tribe,
Plaintiffs-Appellees,

v.

STATE OF WASHINGTON, et al.,
Defendants,

and

James Hadley; James Carter; Ann Carter; Charmond Adkins; Larry Alexander; Shirlee Alexander; Grace Boyd; Pierce Davis; Rosemary Duncan; May Davis; James C. Johnston; Sarah Johnston; W.K. Kirch; Jo Ann Kirch; David Mitchell; Louis Nawrot, Jr.; Boon Ho Woo; Harold Bauer; Billie Bauer; William Chase; Frances Fellows; George Grader; Earl Hunsperger; Millicent Hunsperger; Edward Krenz; Eleanor Krenz; H.J. Merrick; Moss Gordon; Margaret Moss; Sewall Reynolds; Emma Reynolds; John Riach; Alva Hazel Robb; Irene Smith; Providence Worley,
Defendants-Intervenors- Appellants.

UNITED STATES of America, et al.,
Plaintiff,

and

Lummi Tribe; Muckleshoot Tribe; Nooksack; Upper Skagit; Squaxin Island; Makah Tribe; Swinomish Indian Tribal Community; Tulalip Tribe; Puyallup Tribe; Quileute Indian Tribe; Hoh Indian Tribe; Suquamish Tribe; Nisqually Indian Tribe; Jamestown Tribe; Lower Elwha Klallam Tribe;
Port Gamble Bands; Skokomish Tribe; Sauk-Suiattle Tribe; Stillaguamish Tribe,
Plaintiffs-Intervenors-Appellants,

and

Quinault Indian Nation;
Confederated Tribes & Bands of The Yakima Indian Nation,
Plaintiffs-Intervenors,

v.

STATE OF WASHINGTON, et al.,
Defendants-Appellees.

UNITED STATES of America, et al.,
Plaintiff-Appellant,

and

Muckleshoot Tribe; Nooksack; Upper Skagit; Squaxin Island;
Lummi Indian Tribe; Makah Tribe; Tulalip Tribe;
Swinomish Indian Tribal Community; Puyallup Tribe;
Quileute Indian Tribe; Hoh Indian Tribe; Suquamish Tribe;
Quinault Indian Nation; Confederated Tribes & Bands of the
Yakima Indian Nation; Nisqually Indian Tribe; Jamestown Tribe;
Lower Elwha Klallam Tribe; Port Gamble Bands; Skokomish Tribe;
Sauk-Suiattle Tribe; Stillaguamish Tribe,
Plaintiffs-Intervenors,

v.

STATE OF WASHINGTON, et al.,
Defendant-Appellee.

UNITED STATES of America,
Plaintiffs-Appellees,

and

Lummi Indian Tribe; Muckleshoot Tribe; Nooksack; Upper Skagit;
Squaxin Island; Makah Tribe; Swinomish Indian Tribal Community;
Tulalip Tribe; Puyallup Tribe; Quileute Indian Tribe; Hoh Indian
Tribe; Suquamish Tribe; Quinault Indian Nation; Confederated
Tribes & Bands of the Yakima Indian Nation; Nisqually Indian
Tribe; Jamestown Tribe;
Lower Elwha Klallam Tribe; Port Gamble Bands; Skokomish Tribe;
Sauk-Suiattle Tribe; Stillaguamish Tribe,
Plaintiffs-Intervenors-Appellees,

v.

STATE OF WASHINGTON, et al.,
Defendant,

and

Puget Sound Shellfish Growers,
Defendants-Intervenors-Appellants.

Nos. 96-35014, 96-35082, 96-35142, 96-35196,
96-35200, 96-35223.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 5, 1997.

Decided Jan. 28, 1998.
Amended Sept. 25, 1998.

Phillip E. Katzen (Argued), Allen H. Sanders, Columbia Legal Services, Seattle, WA, for Jamestown, Lower Elwha, Port Gamble Bands of S'Klallams, Nisqually, Nooksack, Sauk-Suiattle, Skokomish, Squaxin Island, Stillaguamish, Upper Skagit Tribes, Indian Tribes.

Evelyn S. Ying (Argued), Ann C. Juliano, Martin W. Matzen, Peter C. Monson, Attorneys, United States Department of Justice, Environment & Natural Resources Division, Washington, DC, for United States.

Jay D. Geck (Argued), Fronda Woods, and Robert C. Hargreaves, Assistant Attorneys General, John W. Hough, Senior Assistant Attorney General, Attorney General's Office, State of Washington, Olympia, WA, for defendants-appellants-cross-appellees.

James M. Johnson (Argued), Olympia, WA, for, 26 Tideland and Upland Private Property Owners ("UPOW").

Howard M. Goodfriend (Argued) and Malcolm L. Edwards, Edwards, Sieh, Hathaway, Smith & Goodfriend, Seattle, WA, for Private Owners.

Michael Himes (Argued), Albert Gidari, Jr., Perkins Coie, Seattle, WA, for Puget Sound Shellfish Growers.

Eric Richter, Skeel Henke, Evenson & Roberts, Seattle, WA, for Adkins, et. al.

Mason D. Morisset, Seattle, WA, for Tulalip Tribes. Riyaz A. Kanji, Williams and Connolly, Washington, DC, for Jamestown, Lower Elwha, Port Gamble Bands of S'Klallams, Nisqually, Nooksack, Sauk-Suiattle, Skokomish, Squaxin Island, Stillaguamish and Upper Skagit Tribes, Indian Tribes.

John Sledd, Mary Linda Pearson, for the Suquamish Tribe.

Daniel A. Raas, Harry L. Johnsen, for the Lummi Tribe.

Richard Berley, John Arum, Mark Slonim, for the Makah Tribe.

Bill Tobin, Christina Berg, for the Nisqually Tribe.

Annette M. Klapstein, John Howard Bell, Debra S. O'Gara, for the Puyallup Tribe.

Kevin R. Lyon, Ronald Whitener, for the Squaxin Island Tribe.

Robert L. Otsea, for the Muckleshoot Tribe.

Kathryn Nelson, Amy C. Lewis, co-counsel for the Port Gamble, Lower Elwha, Jamestown Bands of S'Klallams and the Skokomish Tribe.

Leslie Barnhart, Lori Salzarulo, Ruth Kennedy for the Quileute Tribe.

Nettie Alvarez, Richard Ralston, for the Hoh Tribe.

Jeffrey Jon Bode, co-counsel for the Nooksack Tribe.

Edward G. Maloney, co-counsel for the Upper Skagit Tribe.

Harold Chesnin, co-counsel for the Upper Skagit Tribe.Allan E. Olson, for the Swinomish Indian Community.

Daniel W. Wyckoff, Olympia, WA, Tom D. Tobin, Winner, SD, for amicus curiae Inner Sound Crab Association and Washington Dungeness Crab Fishermen's Association.

Stephanie L. Striffler, Assistant Attorney General, Salem, OR, for amicus curiae State of Oregon.

Nancie Marzulla, Washington, DC, for amicus curiae Defenders of Property Rights.

Robin Rivett, Sacramento CA, John M. Groen, Bellevue, Washington, for amicus curiae Pacific Legal Foundation.

Toby Thaler, Seattle, WA, for amicus curiae Washington Environmental Council.

Appeals from the United States District Court for the Western District of Washington Edward Rafeedie, District Judge, Presiding. D.C. No. CV-89-00003-ER.

Before: LAY,* BEEZER and TROTT, Circuit Judges.

Order Amending Opinion And Denying Petition For Rehearing And Rejecting Suggestion For Rehearing En Banc And Amended Opinion

OPINION

TROTT, Circuit Judge.

ORDER

The Opinion filed January 28, 1998, slip op. 783, and appearing at 135 F.3d 618 (9th Cir.1998), is amended as follows:

1. At slip op. 829, last sentence of the first full paragraph; 135 F.3d at 640, first full sentence on the page beginning with "All Grower beds ..."; delete the sentence and replace it with, "The other Grower beds will be subject to the allocation analysis below."

2. At slip op. 830, first full paragraph; 135 F.3d at 640, third full paragraph beginning with "We therefore apply ... "; delete the entire paragraph and replace it with a new paragraph and revised footnote as follows:

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* The Honorable Donald P. Lay, Senior Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

"We therefore apply the following analysis to Grower beds where the Growers, or their predecessors, began their enhancement efforts on a natural bed. For such natural beds, the Growers shall demonstrate what portion of their harvest is due to their labor, as opposed to what portion would exist absent the Growers' enhancement. See Shellfish II., 898 F.Supp. at 1462. For such enhanced natural beds, the Tribes shall be entitled to fifty percent of the pre-enhanced sustainable shellfish production from those beds.[12] Of course, this allocation analysis does not apply to artificial beds, that is, to Grower beds that did not support a sustainable commercial density of shellfish prior to cultivation. As the Tribes have acknowledged, the Tribes have no right to harvest such beds. 898 F.Supp. at 1460-61."

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[12] For example, if ten clams per square foot were a density sufficient to support a commercial livelihood at the time that enhancement began, and if a 100 square foot Grower's bed yielded ten clams per square foot prior to the Grower's efforts to enhance the output (1,000 clams), and that same bed now produces fifty clams per square foot as a result of the Grower's labor (5,000 clams), the Tribes would be entitled to fifty percent of the 1,000 clams or 500 clams.

3. At slip op. 834, third full paragraph carrying over to p. 835; 135 F.3d at 642, third full paragraph beginning with "The Tribes argue ..."; delete the paragraph and replace it with five paragraphs as follows:

"Of particular concern to the Tribes is the restriction that allows the Growers to control access to natural clams by choosing not to harvest them in favor of the oysters under which the clams are found. The Tribes describe this restriction as a "gaping loophole" that has the capacity at the Growers' discretion to deny to them the very rights to natural clams which our holding confirms.

The Growers' counter with the argument from the record that the process of harvesting natural clams from underneath the oyster beds can seriously disrupt and suffocate their oysters.

On reflection, the Tribes' concerns although certainly not fanciful-are based at this point on

speculation as to what might happen in the future. The Growers, for example, represent that "where there are substantial economic benefits to a Grower from harvesting clams, the Grower will do so." And, "[a]s soon as the Grower does, the trial court's implementation plan provides that the Tribes have the right to a share of those clams." The Growers say that they are "commercial farmers-if there is money to be made, the resource assuredly will be exploited."

Under the circumstances, we believe that the district court's restrictions do not amount at this time to an abuse of discretion. The district court attempted to fashion a prospective solution to a difficult situation by balancing the parties' respective interests. The district court's restrictions safeguard the Tribes' right of access to the ancient fisheries, but also protect the interests of the Growers and Private Owners. Importantly, in this aspect of the court's decision the court did not use equity as the basis for its interpretation of the decision, but only as a way to implement its correctly reasoned interpretation of the Proviso. While the Tribes may not be happy with the limits imposed on their harvesting, they are still able to effectuate their allocation under the Treaties and are not excluded from their ancient fisheries.

We are confident that any future practices by the Growers that trench inappropriately upon the Tribes' rights as confirmed in this opinion will be adequately dealt with by the district court. The district court is the best place to manage any wrinkles that might crop up. The best way to avoid such problems, of course, is for the parties constructively to work together to respect each others' rights."

4. At slip op. 839, concurring opinion of Judge Beezer; 135 F.3d at 644; withdraw the entire opinion and replace with a new concurring opinion as reflected in the amended opinion filed herewith.

With these amendments, the panel has voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R.App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

I. OVERVIEW

The State of Washington, groups of private tideland property owners ("Private Owners"), and commercial shellfish growers ("Growers") (collectively, "Appellants") appeal the district court's judgment following two bench trials in an action brought by numerous Indian Tribes[1] (the "Tribes") and the United States (on the Tribes' behalf) seeking a declaration of rights to shellfish under the Stevens Treaties ("Treaties"). The United States and the Tribes cross-appeal the district court's order implementing the Tribes' rights.

In 1855, the United States negotiated five Treaties with the Tribes in the Western Washington Territory. The Tribes ceded their aboriginal lands to the United States for settlement, receiving in exchange exclusive title to defined lands, free medical care, schools, occupational training, and annuity payments. The Treaties also reserved to the Tribes the "right of taking fish, at all usual and accustomed grounds and stations ... in common with all citizens of the Territory...." In a series of decisions beginning in 1974, federal courts, including the Ninth Circuit and the Supreme Court, held that this treaty language entitles the Tribes to take fifty percent of the salmon and other free-swimming fish in the waters controlled by Washington State. The Tribes' rights to shellfish under the Treaties, however, are limited by the following proviso (the "Shellfish Proviso"): "Provided, however, That they shall not take shellfish from any beds staked or cultivated by citizens."

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[1] The Tribes are the following: the Tulalip, Puyallup, Squaxin Island, Makah, Muckleshoot, Upper Skagit, Nooksack, Nisqually, Lummi, Skokomish, Port Gamble S'Klallam, Lower Elwha S'Klallam, Jamestown S'Klallam, Suquamish, Swinomish, Hoh, Stillaguamish, Sauk Suiattle, and Quileute. The Yakima Tribe, which participated in the proceedings below, did not appeal the district court's decision that the right to take shellfish is not reserved in its treaty with the United States.

This case concerns the nature and extent of the Tribes' shellfishing rights under the Treaties. The district court concluded in a thoughtful and well-reasoned opinion that the term "fish," as used in the Stevens Treaties, includes shellfish. The court then concluded that the Tribes have a right to take one half of the harvestable shellfish of every species found anywhere within their usual and accustomed fishing areas, except as expressly limited by the Shellfish Proviso. The court interpreted the Shellfish Proviso "only to exclude Indians from artificial, or planted shellfish beds; [the parties to the Treaties] neither contemplated nor desired that the Indians would be excluded from natural shellfish beds." *United States v. Washington*, 873 F.Supp. 1422, 1441 (W.D. Wash. 1994). The court's conclusions substantially reflect the position of the Tribes and of the United States, which the court found to be "overwhelmingly" supported by the historical evidence of the intent of the signatory parties to the Treaties.

After its decision interpreting the Treaties, the district court held a second trial to determine a plan for implementing the Tribes' shellfishing rights ("Implementation Plan"). Employing principles of equity, the court refined its definition of "cultivated" under the Proviso and precluded the Tribes from harvesting shellfish on most of the commercial Growers' property. In addition, the court placed time, place, and manner restrictions on the Tribes' ability to harvest from privately-owned land. Finally, the court devised a system for the appointment and removal of Special Masters to resolve disputes arising from the Implementation Plan. These consolidated appeals followed.

We have jurisdiction under 12 U.S.C. § 1291, and we affirm in part and reverse in part.

II. HISTORICAL BACKGROUND

A. The Stevens Treaties

The record contains extensive persuasive evidence concerning the Tribes' reliance on fish and shellfish for commercial, subsistence, and ceremonial purposes. Fishing was "not much less necessary to the existence of the Indians than the atmosphere they breathed." *United States v. Winans*, 198 U.S. 371, 381, 25 S.Ct. 662, 49 L.Ed. 1089 (1905). The United States Treaty negotiators, under the leadership of Governor Isaac Stevens, were well aware of the Tribes' use and reliance on a wide variety of fish, including shellfish. "The United States' primary purpose [in entering the

Treaties] was to extinguish the Indians' title to the lands in Western Washington, thereby clearing the way for settlement by Europeans." *United States v. Washington*, 873 F.Supp. 1422, 1436 (W.D. Wash.1994) [hereinafter "*Shellfish I*"]. Because of the Tribes' extensive reliance on fish, however, "[t]he United States was aware that ... it was clearly necessary to preserve the Indians' fishing rights." *Id.* "Whatever land concessions [the Tribes] made, the Indians viewed a guarantee of permanent fishing rights as an absolute predicate to entering into a treaty with the United States." *Id.* at 1437.

At the time of the Treaties, a shellfish-cultivation industry had begun to develop at Shoalwater Bay in the Washington Territory. The United States treaty negotiators were familiar with the practices of that industry, which was modeled after the larger, older, and more developed shellfish industry on the East Coast of the United States. *Id.* at 1434. Shellfish farmers created "cultivated" beds (ones on which shellfish spawn would not naturally set) by removing oysters from their natural beds to areas where they could grow more rapidly, or by placing shells or other material to harden the bottom and thereby facilitate the setting of the oysters. In addition to creating cultivated beds, shellfish farmers frequently "staked" beds of shellfish by storing market-sized shellfish removed from other beds until they could be shipped to market. These staked beds did not naturally contain shellfish of the type being stored, and their boundaries were marked for identification purposes with stakes extending above the surface of the water at high tide. *Id.* at 1432-37.

Fish, including shellfish, were exceptionally abundant and considered inexhaustible at treaty time. *Id.* at 1438. Hence, the United States negotiators believed that preserving Indian fishing rights would not interfere with the rights of citizens. The "negotiators were aware of the thriving shellfish industry in fully-developed East Coast cities, and likely assumed based on those examples that development in the Puget Sound and on the western shore would not interfere with the Indians' exercise of their treaty fishing rights." Id.

In light of the above, the United States negotiated five treaties with Indian Tribes of the Western Washington Territory in 1854 and 1855.[2] Through each of these Treaties, in substantially

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[2] Each of the Tribes involved in this proceeding is the successor-in-interest to one or more of these treaties: Treaty of Medicine Creek, December 26, 1854, 10 Stat. 1132; Treaty of Point Elliott, January 22, 1855, 12

identical language, the Tribes secured their preexisting right to take fish:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: Provided, however, That they shall not take shell fish from any beds staked or cultivated by citizens....

Treaty of Medicine Creek, supra, Art. III.

B. Post-Treaty Developments

In the years immediately following the Treaties, the Indians harvested the majority of the shellfish resource. In 1879, however, the territorial legislature passed a law that, for the first time, allowed citizens the exclusive right to use and harvest natural oyster beds. *Shellfish I*, 873 F.Supp. at 1440. "Washington became a state in 1889, and in 1895 it passed legislation (the 'Bush' and 'Callow' Acts) for private purchase of tidelands, even when those tidelands contained natural shellfish beds." *Id.* Since that time, the State has sold off the "vast majority" of its tidelands to private owners. *Id.* at 1439.

Uncontradicted evidence at trial showed that native shellfish populations have declined dramatically and have been replaced to a large extent by foreign species introduced into the area after the Treaties. For example, native littleneck clams have been replaced by the introduced species, manila clams, which comprised over eighty percent of the total clam harvest in the Puget Sound from 1988-90. This litigation–initiated by the Tribes and United States–is the consequence of the increasing competition for, and depletion of, the shellfish resource.

Stat. 927; Treaty of Point No Point, January 26, 1855, 12 Stat. 933; Treaty with the Makah, January 31, 1855, 12 Stat. 939; Treaty of Olympia, July 1, 1855, 12 Stat. 971.

III. PROCEDURAL HISTORY

In 1970, the United States and the Tribes brought suit against the State of Washington seeking an interpretation of the Treaties and an injunction to enforce the Tribes' fishing rights. *See United States v. Washington*, 384 F.Supp. 312, 327 (W.D. Wash.1974) [hereinafter "*Washington I*"].

In *Washington I*, Senior Judge Boldt determined the nature and extent of the Tribes' off-reservation fishing rights with respect to anadromous fish.[3] That decision established the locations of the Tribes' usual and accustomed grounds and stations and found that the Tribes were entitled to take fifty percent of the harvestable fish from those grounds and stations. We affirmed in *United States v. Washington*, 520 F.2d 676 (9th Cir.1976) [hereinafter "*Washington II*"]. The Supreme Court substantially affirmed that decision, concluding that the trial court had correctly adjudicated the nature and extent of the Tribes' fishing rights. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979) [hereinafter "*Fishing Vessel*"]. The Supreme Court's decision in *Fishing Vessel* marks the seventh time that the Supreme Court has addressed the fishing clause of the Stevens Treaties.[4]

The district court in *Washington I* reserved jurisdiction to hear future unresolved issues arising out of the Treaties. Under the court's procedures, the Tribes must bring a request for adjudication of their fishing rights to the court's attention through the filing of a "Request for Determination." *Washington I*, 384 F.Supp. at 419.

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[3] Anadromous fish are fish that migrate up rivers from the sea to breed in fresh water (i.e., salmon).

[4] The other six cases are: *United States v Winans*, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905); *Seufert Bros Co. v United States*, 249 U.S. 194, 39 S.Ct. 203, 63 L.Ed. 555 (1919); *Tulee v Washington*, 315 U.S. 681, 62 S.Ct. 862, 86 L.Ed. 1115 (1942); *Puyallup Tribe v Department of Game*, 391 U.S. 392, 88 S.Ct. 1725, 20 L.Ed.2d 689 (1968); *Department of Game v. Puyallup Tribe*, 414 U.S. 44, 94 S.Ct. 330, 38 L.Ed.2d 254 (1973); *Puyallup Tribe v. Department of Game*, 433 U.S. 165, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977). None of these cases involved interpretation of the Shellfish Proviso.

In 1989, pursuant to the above procedure, sixteen Indian Tribes, later joined by the United States, filed an action in the district court seeking a declaration of the nature and extent of their shellfishing rights.[5] The district court's decision in *Shellfish I* interpreted the Treaties to award fifty percent of the shellfish harvest in Washington waters to the Tribes.

After announcing its decision in *Shellfish I*, the court conducted a six-day "implementation trial." The purpose of the implementation trial was to receive evidence regarding proposed plans to implement *Shellfish I*. Parties submitted competing plans. On August 28, 1995, the district court announced its Implementation Plan. *United States v. Washington*, 898 F.Supp. 1453 (W.D. Wash.1995) [hereinafter "*Shellfish II*"]. In *Shellfish II*, the district court noted that "[t]he Shellfish Growers and Private Property Owners are, effectively, innocent purchasers who had no notice of the Tribes' Treaty fishing right when they acquired their property." *Id.* at 1457. "Consequently, it is incumbent upon this Court to use its equitable powers to effect a balance between the Tribes' Treaty shellfishing right and the Growers' and Owners' interest in the peaceful enjoyment and/or commercial development of their property." *Id.* The district court then made several important rulings.

First, the court ruled that, when the State acts on behalf of its citizens by developing artificial shellfish beds for recreational shellfishing on state-owned tidelands, it is a "citizen" within the scope of the shellfish proviso, which exempts tribal harvesting from "beds staked or cultivated by citizens." *Id.* at 1459-60. The effect of this ruling is to exclude the Tribes from shellfishing in state-created artificial beds.

Second, the court clarified the definition of a "natural shellfish bed" which may not be "staked or cultivated" in the future

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[5] The action was originally filed against only Washington. The following groups subsequently intervened in the proceeding: the Puget Sound Shellfish Growers, representing commercial shellfish growers; the Alexander group and Adkins group of private tideland owners; and a group of private property owners affiliated with the United Property Owners of Washington ("UPOW"). The district court denied motions to intervene filed by the Inner Sound Crab Association, Dungeness Crab Harvesters Association, and the Washington Harvest Divers Association. That ruling was recently affirmed by this Court. *See United States v Washington*, 86 F.3d 1499 (9th Cir.1996).

by the Growers. The court concluded that a "natural shellfish bed" is a "bed which is capable of sustaining a yield of shellfish that will support a commercial livelihood." *Id.* at 1461. The court then found that the minimum density of manila clams that will support a commercial livelihood is 0.5 pounds of mature clams per square foot.

Third, the court redefined "artificial beds," which are exempted by the Shellfish Proviso from the reach of the Tribes' shellfishing rights. The court believed that it would be "very difficult" to determine whether beds on Growers' properties were "artificial" or "natural" and that the Tribes should not benefit from the Growers' efforts to enhance the shellfish resource on their own properties. *Id.* at 1461-62. The court therefore modified the definition of "cultivated" to encompass the "wide range of techniques used by the Growers to enhance production of shellfish on their property." *Id.* The court referred to these beds as "de facto artificial beds." *Id.* at 1462 & n. 18. Under the court's ruling, only "those beds whose existence is entirely due to the natural propagation of the species" are subject to the Tribes' Treaty rights. *Id.* at 1462.

Fourth, the court imposed "time, place, and manner" restrictions on the Tribes' right to shellfish on private properties. *Id.* at 1470-73. One such restriction was a blanket ban on upland access across private property absent consent by the owner.

The court also set forth dispute resolution procedures, calling for a panel of four special masters: one selected by the Tribes, one by the Growers, one by the Private Owners, and one by the State. *Id.* at 1475-76. A single master, drawn from the four, determines each dispute. Under the court's decision, the masters have the power to award damages against Tribes who violate the Implementation Plan. Id.

In response to motions to reconsider its decision in *Shellfish II*, the district court amended its decision on December 18, 1995. *United States v. Washington*, 909 F.Supp. 787 (W.D. Wash.1995) [hereinafter "*Shellfish III*"]. In *Shellfish III*, the court revised its ban on upland tribal access to shellfish beds absent consent of the landowner by allowing tribes to cross private land after a showing of "the absence of access by boat, public road, or public right-of-way." *Id.* at 793. Disputes over access must be presented to a special master. *Id.* at 791-93. The court also changed its decision allowing

the special master to award damages against the Tribes. The master is still able to award damages against individual tribal members who damage private property during exercise of fishing rights, but he or she cannot award damages against the Tribes themselves. *Id.* at 793-94.

IV. STANDARD OF REVIEW

All parties agree that the meaning of the Treaty language is ultimately a question of law reviewed de novo. *United States v. Washington*, 969 F.2d 752, 754 (9th Cir.1992). Although several Private Owner groups assert that the district court's findings regarding the "negotiators' intentions and expectations" are mixed issues of law and fact reviewed de novo, we have previously reviewed a district court's findings of parties' intent in entering Indian Treaties "[u]nder the highly deferential clear error standard." *See, e.g., Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 343 (9th Cir.1996), cert. denied, — U.S. – –, 117 S.Ct. 1432, 137 L.Ed.2d 540 (1997). We therefore review for clear error all of the district court's findings of historical fact, including its findings regarding the treaty negotiators' intentions. We then review de novo whether the district court reached the proper conclusion as to the meaning of the Shellfish Proviso given those findings.

We review for an abuse of discretion the district court's equitable orders. The district court abuses its discretion when its equitable decision is based on an error of law or a clearly erroneous factual finding. *Foster v. Skinner*, 70 F.3d 1084, 1087 (9th Cir.1995).

V. CANONS OF TREATY CONSTRUCTION

"[A]ll Treaties made, ... under the Authority of the United States, shall be the supreme Law of the Land and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2. The goal of treaty interpretation is to determine what the parties meant by the treaty terms. *Shoshone Indians v. United States*, 324 U.S. 335, 353, 65 S.Ct. 690, 89 L.Ed. 985 (1945). "[I]t is the intention of the parties ... that must control any attempt to interpret the treaties." *Fishing Vessel*, 443 U.S. at 675. This analysis of the parties' intentions "begin[s] with the text of the treaty and the context in which the written words are used." *Eastern*

Airlines, Inc. v. Floyd, 499 U.S. 530, 534, 111 S.Ct. 1489, 113 L.Ed.2d 569 (1991) (internal quotations and citations omitted). "'[T]reaties are constructed more liberally than private agreements, and to ascertain their meaning we may look beyond written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.'" *Id.* at 535 (quoting *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32, 63 S.Ct. 672, 87 L.Ed. 877 (1943)).

The Shellfish Proviso is an exception to the Tribes' broad fishing rights. "A proviso is strictly construed, and only those subjects expressly restricted are freed from the operation of the statute." *Sutherland on Statutory Construction*, § 20.22, at 110 (5th ed.1992).

Courts have uniformly held that treaties must be liberally construed in favor of establishing Indian rights. *Confederated Tribes of Chehalis*, 96 F.3d at 340. "Any ambiguities in construction must be resolved in favor of the Indians." *Id.* (citation omitted). "These rules of construction 'are rooted in the unique trust relationship between the United States and the Indians.'" *Id.* (quoting *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985)).

VI. DISCUSSION

A. EXCEPT AS LIMITED BY THE SHELLFISH PROVISO, THE RIGHT OF TAKING SHELLFISH UNDER THE TREATIES IS COEXTENSIVE WITH THE RIGHT OF TAKING FISH.

The district court held that the Treaties grant the Tribes a right to take shellfish of every species found anywhere within the Tribes' usual and accustomed fishing areas, except as expressly limited by the Shellfish Proviso. We agree.

1. The Tribes' shellfish rights are not limited by species.

The State of Washington argues that the Tribes' right to take shellfish is limited to those species of fish actually harvested by the

Tribes prior to the signing of the Treaties.[6] Specifically, Washington contends that the tribes have no Treaty right to certain "deep-water" species[7] of shellfish that were not historically harvested in shallower waters and on tidelands. We respectfully reject this contention because it is plainly inconsistent with the language of the Treaties, the law of the case, and the intent and understanding of the signatory parties. *See Shellfish I*, 873 F.Supp. at 1430.

With all deference to the State, there is no language in the Treaties to support its position: the Treaties make no mention of any species-specific or technology-based restrictions on the Tribes' rights. The district court aptly noted that, had the Treaty parties intended to limit the harvestable species, the parties would not have chosen the word "fish." The word "fish" has "perhaps the widest sweep of any word the drafters could have chosen." *Id.* Thus, the district court correctly chose not to "deviate from [the Treaties'] plain meaning." *Id.*

Washington's position is also contrary to the law-of-the-case doctrine. In 1974, Judge Boldt rejected an argument similar to Washington's current position, stating: "The right secured by the treaties to the Plaintiff tribes is not limited as to species of fish, the origin of fish, the purpose or use or the time or manner of taking...." *Washington I*, 384 F.Supp. at 401. Moreover, the court determined that the Treaties "do not prohibit or limit any specific manner, method, or purpose of taking fish." *Id.* at 402. We previously affirmed these conclusions "in all respects," *Washington II*, 520 F.2d at 693, and we continue to believe they are correct.

Washington relies heavily on the Supreme Court's statement in *Fishing Vessel* that "securing" fishing rights is "synonymous with 'reserving' rights previously exercised." 443 U.S. at 678 (emphasis added). Washington's contention, however, is contrary to the recognized principle that the Treaties involved a grant of rights from the Indians to the United States. *United States v. Winans*, 198 U.S. 371, 380-81, 25 S.Ct. 662, 49 L.Ed. 1089 (1905). In *Winans*, the

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[6] The State of Oregon has filed an amicus brief joining Washington in this argument.

[7] The deep-water species include: geoduck (pronounced "gooey duck"—a kind of giant clam), sea urchin, sea cucumber, and certain species of crab and shrimp.

Supreme Court upheld the Indians' right of access over private property in order to fish in the Columbia River. *Id.* at 384. The Court construed the fishing rights in the Stevens Treaty as "not a grant of rights to the Indians, but a grant of rights from them-a reservation of those not granted". *Id.* As the district court explained:

> At [Treaty] time, ... the Tribes had the absolute right to harvest any species they desired, consistent with their aboriginal title.... The fact that some species were not taken before treaty time-either because they were inaccessible or the Indians chose not to take them-does not mean that their right to take such fish was limited. Because the "right of taking fish" must be read as a reservation of the Indians' pre-existing rights, and because the right to take any species, without limit, pre-existed the Stevens Treaties, the Court must read the "right of taking fish" without any species limitation.

Shellfish I, 873 F.Supp. at 1430 (citation omitted). A more restrictive reading of the Treaties would be contrary to the Supreme Court's definitive conclusion that the Treaties are a "grant of rights from" the Tribes. *Winans*, 198 U.S. at 380. We therefore reject Washington's argument that the Tribes are limited in the species of shellfish they harvest.

2. The "usual and accustomed grounds and stations" do not vary by species of fish.

Appellants argue that the district court erred in holding that the right of taking fish within "all usual and accustomed grounds and stations" of a Tribe does not vary by species of fish. They contend that the Tribes' "usual and accustomed" fishing grounds for shellfish are not coextensive with the usual and accustomed grounds for the taking of other fish, the boundaries of which were determined in *Washington I*. They suggest that the Tribes must establish their usual and accustomed grounds for each species of fish. We respectfully disagree.

In *Washington I*, the court found that "every fishing location where members of a tribe customarily fished ... is a usual and accustomed ground or station at which the treaty tribe reserved, and its members presently have, the right to fish." 384 F.Supp. at 332. That court heard extensive evidence and made findings with respect to each Tribes' usual and accustomed fishing grounds. *Id.* at 359-82. Since the time Judge Boldt made these findings, courts considering

fishing disputes under the Treaties have never required species-specific findings of usual and accustomed fishing grounds. In fact, the district court in a prior proceeding on a related Stevens Treaties case found that the usual and accustomed grounds and stations for herring (a non-anadromous fish) were co-extensive with those previously adjudicated for salmon (an anadromous fish). *United States v. Washington*, 459 F.Supp. 1020, 1049 (W.D. Wash.1978) (ruling that the tribes may take herring at all of its usual and accustomed fishing places to the same extent and subject to the same terms and conditions as specified in *Washington I*).

Moreover, it would be extremely burdensome and perhaps impossible for the Tribes to prove their usual and accustomed grounds on a species-specific basis. "Little documentation of Indian fishing locations in and around 1855 exists today." 459 F.Supp. at 1059. If each Tribe were required to prove its usual and accustomed grounds for every species of fish and shellfish, the time and cost to the court and parties would be unreasonably burdensome.

In light of the above, the district court was correct in concluding that the Tribes' usual and accustomed grounds for shellfish are co-extensive with the Tribes' usual and accustomed fishing grounds, which have been previously decided by the courts.

3. The Equal Footing Doctrine does not preclude tribal harvesting.

Appellants contend that the "Equal Footing Doctrine" and the "Shively presumption" preclude tribal harvesting on the tidelands. "Under the Equal Footing Doctrine, every new state is entitled to entrance into the Union free of any encumbrance on its land, so that it stands on 'equal footing' with the other states." *Shellfish I*, 873 F.Supp. at 1442-43 (citing *Shively v. Bowlby*, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331 (1894)). "The *'Shively* presumption' is an outgrowth of this doctrine, and holds that any pre-statehood grant of property does not include tidelands unless the grant clearly indicated that tidelands were included." *Id.* at 1443 (citation omitted). We conclude that the language of the Treaties, the law of this case, and the Supreme Court's prior applications of the Equal Footing Doctrine all counsel against its application in the instant case.

In short, Appellants contend that any treaty right to harvest shellfish would amount to a property interest in the tidelands, and because the Treaties do not clearly specify an intent to grant a

property interest in the tidelands, the Treaties cannot be construed as providing rights to harvest shellfish. The district court rejected this argument and interpreted the Treaties "without regard to the Equal Footing Doctrine or the Shively presumption." *Id.* We agree with the district court's interpretation.

Appellants rely primarily on two cases, *United States v. Holt State Bank*, 270 U.S. 49, 46 S.Ct. 197, 70 L.Ed. 465 (1926), and *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981). Both cases involved disputes over Indian title rights to lands underlying navigable waters. In both cases, the Supreme Court applied the *Shively* presumption and concluded that the treaties at issue "did not by [their] terms formally convey any land to the Indians at all." *Montana*, 450 U.S. at 553. In *Holt State Bank*, the Court concluded "there was nothing in [the treaties] which even approaches a grant of rights in lands underlying navigable waters." 270 U.S. at 58.

In the instant case, however, "the Tribes possess the disputed rights [to harvest shellfish] pre-treaty, and the treaty simply effects a reservation of rights." 873 F.Supp. at 1443. As the district court stated:

> It is settled under *Washington II* that the fishing rights at issue in this case predated the Stevens Treaties, and the Treaties simply effected a reservation of those rights. Similarly, the Supreme Court acknowledged the reservation in *Fishing Vessel*: "The fishing clause speaks of 'securing' certain fishing rights, a term the Court has previously interpreted as synonymous with 'reserving' rights previously exercised." *Fishing Vessel*, 443 U.S. at 678. Because the Stevens Treaties must be construed as a reservation of rights by the Tribes, not a granting of rights by the United States, the Shively presumption and the Equal Footing Doctrine cannot play a role in the evaluating the existence or scope of the rights.

Id. at 1443-44 (citation omitted). We adopt the district court's persuasive reasons for rejecting the application of the Shively presumption to defeat the Tribes' shellfishing rights.

We note that "the Supreme Court has applied the Equal Footing Doctrine in one context only, namely when evaluating a

claim of right to lands beneath navigable waters based upon an alleged conveyance or retention of fee simple ownership by the United States prior to statehood." *Id.* at 1444 (citing cases); see *Montana*, 450 U.S. at 550-51 ("The question is whether the United States conveyed beneficial ownership of the riverbed to the Crow Tribe by the Treaties of 1851 or 1868."); *Holt State Bank*, 270 U.S. at 57 (adjudicating the question of "whether the lands under the lake were disposed of by the United States before Minnesota became a state"); *Utah Div. of State Lands v. United States*, 482 U.S. 193, 204, 107 S.Ct. 2318, 96 L.Ed.2d 162 (1987) (The United States answered in the district court that title to the lakebed remained in federal ownership by selection of the lake as a reservoir site prior to Utah's statehood). Unlike the above cases, the instant case does not involve ownership of tidelands. The Tribes do not claim ownership of the tidelands; the Tribes merely assert their right to harvest shellfish within the tidelands, regardless of ownership.

Moreover, application of the Equal Footing Doctrine has already been rejected in the context of the Stevens Treaties fishing rights. First, the Supreme Court in Winans noted:

> [I]t is contended that the State acquired, by its admission into the Union "upon an equal footing with the original States," the power to grant rights in or to dispose of the shore lands upon navigable streams, and such power is subject only to the paramount authority of Congress with regard to public navigation and commerce. The United States, therefore, it is contended, could neither grant nor retain rights in the shore or to the lands under water.
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> * * *
>
> The extinguishment of the Indian title, opening the land for settlement and preparing the way for future States, were appropriate to the objects for which the United States held the Territory. And surely it was within the competency of the Nation to secure to the Indians such a remnant of the great rights they possessed as "taking fish at all usual and accustomed places."

198 U.S. at 382-84. Similarly, Appellants' Equal Footing arguments have been rejected in this case:

> Admission of the State of Washington into the Union upon an equal footing with the original states had no effect upon the treaty rights of the Plaintiff tribes. Such admission imposed upon the State, equally with other states, the obligation to observe and carry out the provisions of treaties of the United States.

Washington I, 384 F.Supp. at 401. Thus, we can identify no reason or rule that would mandate the application of the Equal Footing Doctrine to limit the Tribes' fishing rights in this case. The language of the Treaties, the law of this case, and the Supreme Court's prior applications of the Equal Footing Doctrine all preclude its application here.

4. The Tribes are entitled to harvest shellfish on privately-owned tidelands.

The Private Owners contend that the Tribes' right to take shellfish does not include the right to take shellfish found on privately-owned tidelands. The Private Owners argue that the Treaties gave the Tribes the same common right to harvest shellfish as that enjoyed by non-Indian citizens, and that this common right was diminished by the conveyance of the property into private ownership. They contend also that the Treaties only allow the Tribes to take the common resources of "public water and public lands," not to take shellfish on private lands. We reject these contentions.

First, the Supreme Court has consistently rejected arguments to the effect that Indian treaties reserve to the Indians no more fishing rights than those enjoyed by non-Indian citizens. *See Winans*, 198 U.S. at 380 (rejecting lower court ruling that Indians had no more rights than any inhabitant of the Territory); *Fishing Vessel*, 443 U.S. at 676-77 & n. 22 (rejecting argument that Indians only possessed rights in common with other citizens).

Second, as the Supreme Court explained in Winans, the Tribes were promised "the right of taking fish at all usual and accustomed places" and the right "of erecting temporary buildings for curing them." 198 U.S. at 381. "The contingency of future ownership of the lands, therefore, was foreseen and provided for" and, "in other words, the Indians were given a right in the land." *Id.* *Winans* directly contradicts the Private Owners' argument: the Supreme Court has made clear that the Tribes' fishing rights in their usual and accustomed places are not diminished by private

ownership of those lands. In fact, the Court noted that the Treaties "imposed a servitude upon every piece of land as though described therein." Id.

Moreover, in *Fishing Vessel*, the Supreme Court explicitly recognized that the "[T]reaties provide Indians with certain rights—i.e., the right ... to cross private lands—that non-Indians do not have." *Fishing Vessel*, 443 U.S. at 676 n. 22. The district court acknowledged this right in *Shellfish III* and correctly concluded that:

> [U]pon proper showing of the need for land access, the Tribes would be entitled under Winans to cross private property in order to exercise their fishing rights. Resolving the issue of Tribal access across private property requires the balancing of competing interests, and the Court emphasizes that land access is not to be granted unless there is a proper showing of the need for such.

909 F.Supp. at 792.

This case is not the first Stevens Treaties case to implicate private property rights. The previous fishing rights cases, upheld in *Fishing Vessel*, noted that the Treaties "include[ ] the right to use private tidelands for beach seines, tidal impoundment traps, stake nets and reef nets." *Shellfish I*, 873 F.Supp. at 1444; see *Washington I*, 384 F.Supp. at 360-61, 378. Appellants' attempts to distinguish the anadromous fishing rights from the shellfishing rights are not persuasive. The Supreme Court has said that "[i]t is absolutely clear, as Governor Stevens himself said, that neither he nor the Indians intended that the latter should be excluded from their ancient fisheries, and it is accordingly inconceivable that either party deliberately agreed to authorize future settlers to crowd the Indians out of any meaningful use of their accustomed places to fish." *Fishing Vessel*, 443 U.S. at 676.

The Private Owners also contend that shellfish are different than anadromous fish because they have traditionally been held to be a part of the land. The district court rejected this contention, stating that "the uniform common law at treaty time held that private ownership of a parcel of tideland did not include private rights to the shellfish on that parcel." *Shellfish I*, 873 F.Supp. at 1439. In support of this proposition, the district court cited Joseph Angell's 1847 Treatise on the Right of Property in Tide Waters, which states that "[t]here is no doubt, that the public have a right to take shellfish

on the shore, though the right of soil in the shore happens to be private property."

On appeal, both the Tribes and the Private Owners cite several cases in support of their respective contentions that the right to harvest shellfish from private property was (or was not) permitted at Treaty time. *See Smith v. Maryland*, 59 U.S. (18 How.) 71, 74-75, 15 L.Ed. 269 (1855) (stating that "the enjoyment of certain public rights" included "the common liberty of taking fish, as well shellfish as floating fish"); *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 413-14, 10 L.Ed. 997 (1842) (noting that public rights applied "as well for shell-fish and floating fish"). *But see Den v. The Jersey Co.*, 56 U.S. 426, 432-33, 15 How. 426, 14 L.Ed. 757 (1853) ("Clams ordinarily live in the soil under the waters, and not within the waters.... They therefore, in a very material sense, belong with the land."). Regardless of whether shellfish were a private or public resource at treaty time, or today, the Treaties secured the Tribes' right to fish at their usual and accustomed grounds and stations. The Tribes therefore acquired the right to take shellfish from the tidelands within their usual and accustomed grounds, without regard to the public or private nature of their ownership. As the district court stated in *Washington I*, "[b]ecause the right of each treaty tribe to take anadromous fish arises from a treaty with the United States, that right is reserved and protected under the supreme law of the land, does not depend on state law, is distinct from rights or privileges held by others, and may not be qualified by any action of the state." 384 F.Supp. at 402. Thus, whatever the status of the state law at the time of the Treaties or today, the Treaties represent the supreme law of the land and give to the Tribes the right to take shellfish from private tidelands. *See Fishing Vessel*, 443 U.S. at 682 (stating that "neither party to the treaties may rely on the State's regulatory powers or on property law concepts to defeat the other's right to a 'fairly apportioned' share of each covered run of harvestable anadromous fish") (emphasis added).

In light of *Winans*, *Fishing Vessel*, and the Treaties' language and power as the supreme law of the land, the district court correctly determined that the Tribes have a right to harvest shellfish on private tidelands.

B. THE DISTRICT COURT PROPERLY INTERPRETED THE MEANING OF THE SHELLFISH PROVISO.

The Treaties' fishing clauses were expressly limited by the Shellfish Proviso, which prohibited the Tribes from taking shellfish

from "any beds staked or cultivated by citizens." The district court "interpret[ed] the terms 'staked' and 'cultivated' as the terms were defined and used in the shellfishing industry at and before treaty time." 873 F.Supp. at 1441. The district court concluded that, when the signatory parties used those terms in the Proviso, "they intended only to exclude Indians from artificial, or planted, shellfish beds; they neither contemplated nor desired that the Indians would be excluded from natural shellfish beds." *Id.* "Therefore, the words 'any beds staked or cultivated by citizens,' describe artificial shellfish beds created by private citizens." Id.

The Growers offered the district court an alternative definition of staked or cultivated that "starts and ends with the treaty-time dictionary." *Id.* at 1431. The district court noted that under the Growers' theory, "any shellfish bed extant today that is surrounded by stakes, or in some fashion improved by human labor, would be off limits to the Indians." *Id.* The Private Owners make a similar contention, arguing that "'staked' should be interpreted in its 'frontier' context and thus should be regarded as a synonym for 'claimed as private property.' Therefore, all privately-owned tideland, whether or not surrounded by stakes, would be protected by the Shellfish Proviso." *Id.* The district court rejected the Growers' and Private Owners' definitions, analyzing the Shellfish Proviso in light of: (1) the surrounding treaty words, (2) the record of the treaty negotiations, (3) the historical circumstances that gave rise to the Stevens Treaties, (4) the possible alternative formulations of the Shellfish Proviso, and (5) the post-treaty conduct of both parties. *Id.* at 1435. In short, the court found that "the Tribes presented compelling evidence that only artificial beds were 'staked' or 'cultivated' at treaty time." *Id.* at 1431-42. Given the deferential standard by which we review the district court's findings of historical fact and its findings regarding the intentions of the parties' negotiators, we conclude the district court did not err in interpreting the Proviso and we adopt its analysis as our own. Moreover, we believe that the district court's reasoned analysis of the Proviso is correct. We emphasize three additional points.

First, the Growers' and Private Owners' interpretations are not based on the common understanding of the phrase "beds staked or cultivated" within the context of the shellfishing industry at treaty time. The district court made a factual finding that the treaty negotiators drew the language of the Shellfish Proviso from terms commonly used in the fledgling shellfishing industry. Although the Growers may have presented evidence to the contrary, none of this evidence leaves us with a "definite and firm conviction" that a

mistake has been committed. *See Sawyer v. Whitley*, 505 U.S. 333, 346 n. 14, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992). It was therefore not clear error for the district court to have rejected Appellants' interpretation and to have adopted the Tribes' position.

Second, the Growers' interpretation is totally inconsistent with the "United States' avowed intention to preserve for the Indians their ancient fisheries." *Id.* at 1437. The Growers' and Private Owners' interpretations would read the Proviso to effectively eliminate the Tribes' right to take shellfish under the Treaties. Surely, Governor Stevens would not have intended such a result, especially in light of the historical circumstances surrounding the Treaties' negotiations. In fact, the benevolent approach taken by the United States treaty negotiators was noted by the Supreme Court in *Fishing Vessel*:

> Governor Stevens made the following statement to the Indians gathered at Point-No-Point to negotiate the treaty bearing that name: "Are you not my children and also children of the Great Father? What will I not do for my children, and what will you not for yours? Would you not die for them? This paper is such as a man would give to his children and I will tell you why. This paper gives you a home. Does not a father give his children a home? ... This paper secures your fish. Does not a father give food to his children?"

443 U.S. at 667 n.11 (emphasis added). Likewise, the district court in this case aptly noted:

> The one significant promise for purposes of this litigation is the promise by the United States to the Indians that they would enjoy a permanent right to fish as they always had. This right was promised as a sacred entitlement, one which the United States had a moral obligation to protect. The Indians were repeatedly assured that they would continue to enjoy the right to fish as they always had, in the places where they had always fished. There is no indication in the minutes of the treaty proceedings that the Indians were ever told that they would be excluded from any of their ancient fisheries.

Shellfish I, 873 F.Supp. at 1435. Were we to adopt the Growers' definition of staked or cultivated, we would be providing "an

impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the nation for more." *Winans*, 198 U.S. at 380.

Third, the Appellants' interpretation of the Proviso casts aside black-letter canons of statutory construction and treaty interpretation. The Shellfish Proviso is an exception to the Tribes' otherwise broad fishing rights. "A proviso is strictly construed, and only those subjects expressly restricted are freed from the operation of the statute." *Sutherland on Statutory Construction*, § 20.22, at 110 (5th ed.1992). Moreover, courts have uniformly held that treaties must be liberally construed in favor of the Indians. *Confederated Tribes of Chehalis*, 96 F.3d at 340. "These rules of construction 'are rooted in the unique trust relationship between the United States and the Indians.'" *Id.* (quoting *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985)). The Appellants' interpretation of the Proviso would render meaningless the above canons of construction and interpretation.

C. THE DISTRICT COURT CORRECTLY REJECTED APPELLANTS' AFFIRMATIVE DEFENSES.

The Growers contend that we should apply the doctrine of laches to defeat the Tribes' claim to shellfish. The doctrine of laches is defined as "neglect to assert a right or claim which, taken together with lapse of time and other circumstances causing prejudice to [the] adverse party, operates as [a] bar in [a] court of equity." Black's Law Dictionary 875 (6th ed.1990). In urging us to apply laches, the Growers argue that "this is an extraordinary case.... These extraordinary facts call for new law." Growers' Opening Brief at 44.

The Growers ask for new law simply because current law precludes their argument. In *Swim v. Bergland*, 696 F.2d 712, 718 (9th Cir.1983), we held that "laches or estoppel is not available to defeat Indian treaty rights." Although the equities do weigh heavily in favor of the Growers' argument—the Tribes waited 135 years to assert their shellfishing rights—the law does not support their claim. *See Board of County Comm'rs v. United States*, 308 U.S. 343, 350-51, 60 S.Ct. 285, 84 L.Ed. 313 (1939) (defenses based on delay in bringing claims such as laches and estoppel are inapplicable to claims to enforce Indian rights). Once again, we reiterate that we are interpreting a treaty, and that treaties enjoy a unique position in our law.

UPOW's argument that the Tribes' treaty rights were extinguished by the Indian Claims Commission Act, 25 U.S.C. § 70 (repealed 1978), is without merit. Judge Boldt rejected this theory over twenty years ago, see *United States v. Washington*, 459 F.Supp. 1020, 1039-42 (W.D. Wash.1978), and we reject it here for the same reasons.

D. THE DISTRICT COURT ABUSED ITS DISCRETION IN LIMITING THE TRIBES' RIGHT TO HARVEST SHELLFISH FROM CERTAIN AREAS BECAUSE THE DISTRICT COURT'S ORDER REDEFINED THE TERMS OF THE TREATY.

In their cross-appeal, the Tribes and the United States contend that, in its implementation decision (*Shellfish II*), the district court disregarded its own admonition in its first decision that it lacked authority to rewrite or interpret the terms of the treaties to avoid hardship to any party based on its own notions of the equities. The implementation decision, the Tribes contend, erroneously redefined the terms of the treaties in abrogation of the Tribes' right to take shellfish. For example, the district court refined its definition of the word "cultivated" in the Proviso and imposed "time, place, and manner" restrictions on the Tribes' ability to harvest shellfish.

We hold that the district court impermissibly employed equitable powers to rewrite the Treaties' terms. However, we also hold that allocating fifty percent of the commercial Growers' shellfish harvest to the Tribes would unjustly enrich them. Such an allocation would simply not comport with *Fishing Vessel*'s concept of giving the Tribes a "fair share" of the harvest.

1. The district court improperly limited the Tribes' right to take shellfish from the Growers' shellfish beds.

In *Shellfish II*, the district court declared that "it is incumbent upon this Court to use its equitable powers to effect a balance between the Tribes' Treaty shellfishing right and the Growers' and Owners' interest in the peaceful enjoyment and/or commercial development of their property." *Id.* Using these "equitable powers," the district court formulated a "broader" definition of a "cultivated" shellfish bed that applies only to "the existing beds on property owned or leased by Growers licensed by the State of Washington." *Id.* at 1461. The court then deemed

natural shellfish beds that have been enhanced by human means "de facto artificial beds" upon which the Tribes may not take shellfish.[8] *Id.* at 1462. "Permitting the Tribes to harvest fifty percent of the shellfish from de facto artificial beds would confer a windfall on the Tribes, and would neither protect nor encourage the growth of the shellfish industry." Id.

In support of its use of equitable principles, the district court and Appellants primarily rely on five cases: *Yankton Sioux Tribe of Indians v. United States*, 272 U.S. 351, 357, 47 S.Ct. 142, 71 L.Ed. 294 (1926) (awarding Indians monetary payment rather than ejecting "innumerable innocent purchasers" from tribal land); *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 519 n.5, 106 S.Ct. 2039, 90 L.Ed.2d 490 (1986) (Blackmun, J., dissenting) (citing *Yankton* and acknowledging that equitable considerations might have limited the remedies available had the plaintiff tribe prevailed on its claim to 144,000 acres of land); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 260, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985) (Stevens, J., dissenting) (urging that laches be applied to bar Indians' claim to lands); *Brooks v. Nez Perce County, Idaho*, 670 F.2d 835 (9th Cir.1982) (in an action to quiet title to a parcel of land, equitable considerations would not bar the claim to the land entirely, but "[l]ack of diligence by the government in exercising its role as trustee may be weighed by the district court in calculating damages" for several decades of loss of use of the land); *United States v. Imperial Irrigation Dist.*, 799 F.Supp. 1052 (S.D.Cal.1992) (employing tort-law equitable principles to award monetary damages to the plaintiff Indians, rather than restoring tribal land to them).

None of the above cases, however, involve the use of equitable considerations in interpreting Indian treaties. At best, they condone the use of equity as a tool to calculate damages. The majority in *Oneida*, 470 U.S. at 244, stated that "it is far from

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[8] The court declared that only "those beds whose existence is entirely due to the natural propagation of the species" are subject to the Tribes' Treaty rights. This declaration excluded from Tribal harvest: 1) beds created from scratch; 2) beds enhanced by planting, netting or seeding pre existing shellfish beds; 3) beds enhanced by using predator control or rototilling in or around preexisting beds; and 4) "beds whose existence is due to the Grower's efforts, albeit passively, such as the 'natural' migration of shellfish from an artificial bed to a new spot." *Shellfish II*, 898 F.Supp. at 1462.

clear that [laches] is available in suits such as this one" to restore Indian lands to Indians pursuant to treaty rights. In fact, in the terse three-page *Brooks* opinion, the court concluded that laches was not a valid bar to the Indians fifty-four-year-old complaint for a parcel of land. 670 F.2d at 837. *Brooks* had nothing to do with interpretation of an Indian treaty, but merely concluded that the lengthy delay in pursuing the action could be used in "calculating damages." Here, by contrast, the district court is using equitable principles to assist in fashioning the remedy and in interpreting the Treaty.[9]

The Tribes, on the other hand, cite persuasive and unambiguous Supreme Court authority. The district court's re-interpretation violates the Supreme Court's admonition in *United States v. Choctaw Nation*, 179 U.S. 494, 532-33, 21 S.Ct. 149, 45 L.Ed. 291 (1900), a seminal Indian treaty interpretation case:

> But in no case has it been adjudged that the courts could by mere interpretation or in deference to its view as to what was right under all the circumstances, incorporate into an Indian treaty something that was inconsistent with the clear import of its words.... We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation, upon any notion of equity or general convenience, or substantial justice.

(emphasis added; quotation and citation omitted). The district court itself recognized in *Shellfish I*:

> In reaching its decision, the Court may not rewrite the Treaties or interpret the Treaties in a way contrary to settled law simply to avoid or minimize any hardship to the public or to the intervenors. Indeed, the Court has no such power. Rather, amelioration from such hardships should be sought from Congress, which has the power to abrogate the treaty....

873 F.Supp. at 1429. *See also Choctaw*, 179 U.S. at 531-32 (citing cases in support of rule that "the language used in treaties with the

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[9] The Imperial Irrigation District case provides little support for the Appellants. First, it is currently pending on appeal. Second, it is stayed pending settlement discussions. *See* 799 F.Supp. at 1068.

Indians should never be construed to their prejudice" and that words should be construed as they "were understood by this unlettered people, rather than their critical meaning"). Under these rules of construction, the *Choctaw* precedent, and the district court's own statements in *Shellfish I*, the district court abused its discretion by applying notions of equity to redefine the term "cultivate."

It does not follow from the above, however, that the district court is without the ability to use equity in implementing its Treaty interpretation. As laid out below, we believe the district court should have used its equitable powers only to limit the take of the Tribes—not the location—so as to avoid any unjust enrichment.

2. The district court improperly allocated to the Tribes a fifty-percent share of shellfish from the Growers' beds.

Appellants contend that Tribes' allocation of fifty-percent of the shellfish resource exceeded their "fair share." Appellants suggest that the district court should have considered "equitable factors" and that it improperly applied the "moderate living" analysis suggested by the Supreme Court in *Fishing Vessel*, 443 U.S. at 684-686. Although we conclude that the district court correctly applied *Fishing Vessel* 's moderate living analysis, we hold that the district court should have used equitable principles to limit the Tribe's shellfish harvest from the Growers' beds to a "fair share."

In *Fishing Vessel*, the Court stated that an equitable measure of the common right should initially divide the harvestable portion of each run that passes through a "usual and accustomed" place into approximately equal treaty and non- treaty shares, and should then reduce the treaty share if tribal needs may be satisfied by a lesser amount. 443 U.S. at 685. The Court elaborated on this concept:

> [T]he central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but no more than is necessary to provide the Indians with a livelihood-that is to say, a moderate living.... If, for example, a tribe should dwindle to just a few members, or if it should find other sources of support that lead it to abandon its fisheries, a 45% or 50% allocation of an entire run that passes through its customary fishing grounds would be manifestly inappropriate because the livelihood of the tribe under

> those circumstances could not reasonably require an allotment of a large number of fish.

Id. at 686-87. Appellants contend that the district court's allocation of fifty percent of the shellfish resource goes beyond what is necessary to afford the Tribes a "moderate living."

The district court, however, heard evidence as to the Tribes' living standards presented by both sides and concluded that Appellants' experts' analyses were "flawed."[10] The district court made the following finding:

> The uncontroverted evidence presented at trial is that the Tribes lag significantly behind other residents of the State of Washington in their overall standard of living. For example, approximately one in three Tribal members live below the poverty level; Indians in the State of Washington endure health circumstances characterized by the State as "very poor;" tribal members have per capita incomes that are less than one half the per capita income of non-tribal residents of the State; and tribal members suffer from unemployment rates at least three times greater than that of all non-tribal residents of the State of Washington.

Shellfish I, 873 F.Supp. at 1446. This finding is not clearly erroneous.[11]

However, *Fishing Vessel* instructs us to give the Tribes a "fair share" and to "fairly apportion" the fish. *Fishing Vessel*, 443 U.S. at 682, 686. With respect to the Growers' shellfish beds, we conclude that it would contravene such notions of fairness if the Tribes were permitted to take fifty percent of the Growers' enhanced harvest. Many of the Growers have spent decades developing and

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10 UPOW's expert, Dr. Thomas, relied solely on what he called "tribal household income" and compared it to a moderate living standard by reference to the Bureau of the Census income data for non-Indian households. 873 F.Supp. at 1446. The district court concluded that this analysis was flawed because it relied only on income, making it a "single-indicator" analysis. *Id.*

11 Even if we were to consider Tribal income from casino operations—as the Appellants ask us to do—we would not be left with a "definite and firm conviction" that the district court's findings were erroneous.

enhancing production on their shellfish beds, investing their valuable time, energy, and considerable resources. We therefore hold that only those Growers' beds that exist solely by virtue of the natural propagation of the species are subject to a full fifty-percent harvest allocation. The other Grower beds will be subject to the allocation analysis below.

Our decision here is consistent with our previous decision in *United States v. Washington*, 759 F.2d 1353, 1358-59 (9th Cir.1985) (en banc), where we concluded that hatchery fish are subject to Treaty allocation. In that decision, several "equitable considerations" favored the Tribes' position, including "the lack of State ownership of the fish once released" and "the lack of any unjust enrichment of the Tribes." *Id.* Here, however, those same equitable considerations do not support the Tribes' allocation of fifty percent of the Growers' shellfish. First, unlike hatchery fish—which are replacement fish that are released into the water when grown—shellfish on the Growers' beds remain on the Growers' beds until they are harvested. Second, in the instant case, the Tribes would be unjustly enriched if they were entitled to a full fifty percent of the Growers' shellfish. The Tribes candidly admitted as much at oral argument when they conceded that equity should permit a Grower to protect his enhanced harvest "for a couple of years." We believe not for a couple of years, but forever.

Our conclusion squares with one of the purposes of the Proviso, which was "to protect the fledgling oyster industry['s]" efforts to create a harvest where there was none, or where it was insufficient to support a commercial livelihood. *Shellfish I*, 873 F.Supp. at 1437-38; *see also id.* ("To the extent [the Proviso] prohibited Indians from taking shellfish from both artificial and natural shellfish beds where settlers were engaging in fruitful harvesting, [the Proviso] would aid the development of the industry."). Moreover, the Tribes are not excluded from their ancient fisheries; they are merely precluded from taking an unfair share.

We therefore apply the following analysis to Grower beds where the Growers, or their predecessors, began their enhancement efforts on a natural bed. For such natural beds, the Growers shall demonstrate what portion of their harvest is due to their labor, as opposed to what portion would exist absent the Growers' enhancement. *See Shellfish II.*,,.898 F.Supp. at 1462. For such enhanced natural beds, the Tribes shall be entitled to fifty percent of the pre-enhanced sustainable shellfish production from those

beds.[12] Of course, this allocation analysis does not apply to artificial beds, that is, to Grower beds that did not support a sustainable commercial density of shellfish prior to cultivation. As the Tribes have acknowledged, the Tribes have no right to harvest such beds. 898 F.Supp. at 1460-61.[12]

We place the burden of proving pre-enhancement harvest versus post-enhancement harvest on the Growers—for the Growers are best able to prove such a calculation.[13] We remand to the district court for a determination as to the best manner to implement this allocation. We emphasize that this "enhanced allocation" analysis applies only to the Commercial Shellfish Growers' beds.

3. The district court erred by concluding that the State of Washington is a "citizen."

The district court determined that the term "citizens" in the Shellfish Proviso, "includes the State of Washington, when the State acts on behalf of the public." *Id.* at 1459-60. The court noted that "the five million residents of the State are blameless in this controversy, and the Court believes that the benefits and efficiencies of permitting the State to act on their behalf in growing the State's shellfish resource far outweigh any interest the tribes have in limiting the artificial bed exclusion to natural persons." *Id.* n. 11. The court therefore concluded that "to the extent the State hereafter creates artificial shellfish beds on public property, those beds shall be deemed 'staked or cultivated by citizens' and thus excluded under the Shellfish Proviso from the Tribes' Treaty right." *Id.* Because the court once again improperly invoked equitable principles in its interpretation of the Treaty, and there is no support in the law for the proposition that a state can be a "citizen," we reverse this aspect of the district court's decision.

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12 For example, if ten clams per square foot were a density sufficient to support a commercial livelihood at the time that enhancement began, and if a 100 square foot Grower's bed yielded ten clams per square foot prior to the Grower's efforts to enhance the output (1,000 clams), and that same bed now produces fifty clams per square foot as a result of the Grower's labor (5,000 clams), the Tribes would be entitled to fifty percent of the 1,000 clams or 500 clams.

13 One way to do this would be to compare a Grower's bed's earliest shellfish production figures with the bed's current output. This could serve as one of the bases by which to calculate the proper allocation amount.

In the State of Washington's brief and at oral argument, it was unable to cite a single case to support its proposition that a State can be "citizen." We note that it took an act of Congress to enable a corporation to be considered a citizen for purposes of diversity jurisdiction. *See* 28 U.S.C. § 1332. We therefore reverse that portion of the district court's decision which deems the State of Washington a "citizen" for purposes of the Shellfish Proviso.

4. The district court committed clear error in finding that 0.5 pounds of mature clams per square foot is the minimum density necessary to establish a natural bed.

In *Shellfish II*, the district court concluded that "in light of the practices and understandings in the shellfish industry that existed at treaty time, it is clear that a quantitative definition of a natural bed is appropriate." 898 F.Supp. at 1461. The court defined a "natural shellfish bed" as a "bed capable of sustaining a yield of shellfish that will support a commercial livelihood." *Id.* The Tribes do not dispute these findings, but contend that the district court committed clear error when it found that the minimum quantity of manila clams that will support a commercial livelihood is 0.5 pounds of mature clams per square foot. Manila clams are the only species for which the district court made such a finding. Because there is insufficient evidence in the record to support the district court's finding, we conclude that the district court clearly erred.[14]

No witness gave an opinion as to the density of manila clams necessary for a successful commercial harvest. No document in the record sets forth any analysis of what density is necessary for commercial success. There is a document in the record which purports to show the densities of twelve manila clam beds leased from the State of Washington, but twelve beds is far too small and unrepresentative a sample of commercial beds to support a reliable finding of fact. *See, e.g., National Lime Ass'n v. EPA*, 627 F.2d 416, 434 n. 52 (D.C.Cir.1980) (recognizing problems with generalizing "from an extremely limited sample when a broader sample ... can be readily obtained and when no showing of the representativeness of the sample is made") (citations omitted). Moreover, there is no

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[14] Because we conclude that the district court clearly erred, we do not address the Tribes' contention that they were unfairly surprised and unable to present evidence on this issue. On remand, the Tribes will have an opportunity to present such evidence.

indication that these bed samples included only mature clams in their density calculation. Significantly, two of the twelve beds appear to have densities of less than .26 pounds per square foot.

In light of the above, we reverse the district court's finding that the minimum quantity of manila clams that will support a commercial livelihood is 0.5 pounds of mature clams per square foot. We remand to the district court for a new hearing on this issue.

5. The district court did not abuse its discretion by limiting the Tribes' ability to cross private uplands.

The district court prohibited tribal access across privately owned upland property to reach shellfishing areas unless "specifically requested from and granted by a Special Master," with permission to be refused unless "tribal members can demonstrate the absence of access by boat, public road, or public right of way."[15] *Shellfish III*, 909 F.Supp. at 793. The Tribes contend that this decision is "an unprecedented limitation on Tribes' treaty fishing rights."

The Supreme Court has already determined that the Tribes are entitled to a right of access across private lands to invoke their Treaty fishing rights. *Winans*, 198 U.S. at 383. Winans recognized that the Treaties "imposed a servitude upon every piece of land as though described therein." *Id.* at 381. Rather than completely eliminating the Tribes' rights to cross private land, which it could not do under *Winans*, the district court engaged in a careful balancing of hardships in fashioning its remedy. Although we have held that the district court cannot use equitable principles in interpreting the Treaties, it can use them in deciding how to implement the Treaties (i.e., how the tribes will be allowed to exercise their previously interpreted rights). Such a use of equities is permissible under the circumstances of this case. *See Yankton*, 272 U.S. at 357 (allowing monetary damages to Indians in lieu of ejectment of innocent land purchasers in order to avoid a "great

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15 This decision amended the court's decision in *Shellfish II*, which originally held that the Tribes had no right of private upland access at all. 989 F.Supp. at 1473.

injustice").[16] We therefore conclude that the district court did not err by requiring the Tribes to prove the unavailability of other forms of access before allowing them to cross private land.

6. The district court did not abuse its discretion in imposing time, place, and manner restrictions on the Tribes' ability to harvest shellfish.

The district court also invoked equitable principles to subject the Tribes' Treaty shellfishing right to reasonable time, place and manner restrictions when the right is exercised on the Growers' or Owners' property. As discussed directly above, the time, place, and manner restrictions present a proper use of the court's equitable powers.

The court imposed the following restrictions on the Tribes' ability to harvest shellfish: 1) the Tribes' harvest is limited to five days per year, with some increase on larger lots, for any private beach not controlled by a Grower, 898 F.Supp. at 1473; 2) if a Grower decides that a Tribe's proposed harvest plan is not "compatible with the Growers' farming operation," the Grower may unilaterally modify the plan, and have "the final word on how a tribal harvest will be conducted," *id.* at 1470; 3) the Grower may entirely prohibit harvest of natural clams underneath areas cultivated for oysters, even when no oysters are then present, *id.* at 1471; 4) no harvest may occur on non-Grower private tidelands without a survey "to determine the existence of shellfish populations," *id.* at 1472; and 5) the "manner and method" of such a survey must be "of the type currently in use by the State." *Id.*

Of particular concern to the Tribes is the restriction that allows the Growers to control access to natural clams by choosing not to harvest them in favor of the oysters under which the clams are found. The Tribes describe this restriction as a "gaping loophole" that has the capacity at the Growers' discretion to deny to them the very rights to natural clams which our holding confirms.

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[16] The Tribes and the United States also urge us to read into the absence of upland access showing a "reasonableness" requirement. We decline to do so, but we direct the district court, upon remand, to clarify its order with regard to this issue.

The Growers' counter with the argument from the record that the process of harvesting natural clams from underneath the oyster beds can seriously disrupt and suffocate their oysters.

On reflection, the Tribes' concerns although certainly not fanciful-are based at this point on speculation as to what might happen in the future. The Growers, for example, represent that "where there are substantial economic benefits to a Grower from harvesting clams, the Grower will do so." And, "[a]s soon as the Grower does, the trial court's implementation plan provides that the Tribes have the right to a share of those clams." The Growers say that they are "commercial farmers-if there is money to be made, the resource assuredly will be exploited."

Under the circumstances, we believe that the district court's restrictions do not amount at this time to an abuse of discretion. The district court attempted to fashion a prospective solution to a difficult situation by balancing the parties' respective interests. The district court's restrictions safeguard the Tribes' right of access to the ancient fisheries, but also protect the interests of the Growers and Private Owners. Importantly, in this aspect of the court's decision the court did not use equity as the basis for its interpretation of the decision, but only as a way to implement its correctly reasoned interpretation of the Proviso. While the Tribes may not be happy with the limits imposed on their harvesting, they are still able to effectuate their allocation under the Treaties and are not excluded from their ancient fisheries.

We are confident that any future practices by the Growers that trench inappropriately upon the Tribes' rights as confirmed in this opinion will be adequately dealt with by the district court. The district court is the best place to manage any wrinkles that might crop up. The best way to avoid such problems, of course, is for the parties constructively to work together to respect each others' rights.

We reject the Tribes' contention that the restrictions are contrary to the Supreme Court's decision in *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 88 S.Ct. 1725, 20 L.Ed.2d 689 (1968). *Puyallup* arose because a series of Washington state court decisions and state regulations imposed discriminatory restrictions on the Tribes. The Supreme Court held "the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." *Id.* at 398 (emphasis added). The

Tribes cite no persuasive authority, however, to support the application of these standards to an implementation order promulgated by a Federal District Court. *Puyallup* applies to restrictions imposed "by the State," not the Federal Courts. The district court drafted the implementation order to interpret and to enforce the Tribes' rights under the Treaties, not to restrict those rights. The motivation underlying the Court's decision in *Puyallup*—state discrimination against tribal fisheries—is simply not a factor when a district court imposes equitable restrictions of the type present in this case.

7. The district court's procedures for selecting and disqualifying special masters deny due process.

Shellfish III established a panel of four special masters, with one to be randomly selected to hear each dispute. 909 F.Supp. at 793. The Tribes object to two aspects of the plan: 1) Appellants' right to designate three of the four panel members; and 2) the designating parties' ability to remove special masters at will and without court approval. The district court rejected the first objection outright, noting that the two parties to a dispute each have a twenty-five percent chance of having their own special master selected. The Tribes contend that Appellants have almost identical interests: therefore, the odds are 3-1 in Appellants' favor. In fact, the district court made a finding that "each of the other parties is adverse to the Tribes, but not necessarily aligned with the others." *Shellfish III*, 909 F.Supp. at 790. Given the district court's finding that the Appellants are "adverse to the Tribes," we conclude that due process is violated if there is a seventy-five percent chance that Appellants' master will be selected. We therefore vacate this aspect of the implementation plan, and remand to the district court to reconfigure the appointment of Special Masters.

The Tribes also argue that allowing the parties to appoint and remove the master at will compromises the independence of the special master. Because the district court must approve the appointment of the Masters, see *Shellfish III*, 909 F.Supp. at 794, we find no merit in this argument.

8. The district court did not err in authorizing a special master to award damages against Tribal members.

The Tribes argue that *Shellfish III*'s provision allowing the special master to award damages against Tribal members is legally flawed. In addition, they contend that *Shellfish II* erroneously

contains a provision allowing damages against the Tribes themselves. In *Shellfish III*, the district court amended its decision to preclude damage awards against the Tribes because Tribes cannot be sued without their unequivocal consent. *See Oklahoma Tax Comm'n v. Potawatomi Indian Tribe*, 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991). The district court, and the Tribes in their motion for reconsideration, apparently overlooked section 6.2 of *Shellfish II*'s implementation order. Section 6.2 also allows special masters to award damages against the Tribes. We therefore vacate the portion of section 6.2 that allows for a special master to award damages against the Tribes. As set forth below, however, the special master can award damages against individual Tribal members.

The Tribes concede that individuals may be bound by orders affecting their "common public rights as citizens" in litigation to which their sovereign is a party. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 341, 78 S.Ct. 1209, 2 L.Ed.2d 1345 (1958). A similar issue arose in *Fishing Vessel*, 443 U.S. at 692 n. 32, where the Court concluded that non-party fishermen could be enjoined from actions interfering with the judgment of the district court. "[A] court clearly may order them to obey that judgment." *Id.* The Tribes' assertion that "the contemplated claims against tribal members have nothing to do with the common rights of state or tribal citizens" therefore is without merit. On the contrary, if tribal members damage private property while exercising their fishing rights, they directly implicate their sovereigns' interests and the district court's judgment.

Similarly, the Tribes' argument that claims for trampled shrubs, damaged docks, or littered beaches "would raise no federal question" is also without merit. If the damages arise out of the exercise of fishing rights based on the district court's interpretation of the Stevens Treaties, the district court has the authority to hear such a dispute. Moreover, the dispute would arise from the same "nucleus of operative facts," affording the court supplemental jurisdiction under 28 U.S.C. § 1367.

We therefore affirm the special master's ability to recommend damages against individual Tribal members, but vacate section 6.2's provision allowing damages against the Tribes.

9. The district court did not err in determining that the Tribes are not entitled to attorney's fees.

The Tribes request attorney's fees under 42 U.S.C. § 1988. The Tribes' request is foreclosed by *United States v. Washington*, 813 F.2d 1020 (9th Cir.1987) (concluding Tribes not entitled to attorney's fees in entire *United States v. Washington* series of litigation). We therefore affirm the district court's denial of fees.

VII. CONCLUSION

For the reasons discussed above, we AFFIRM IN PART and REVERSE IN PART the district court's decisions in *Shellfish I*, *Shellfish II*, and *Shellfish III*. We REMAND this case to the district court for proceedings consistent with this opinion. In so doing, we compliment the district court for the clarity of its opinions previously rendered.

We recognize the enormous impact our decision will have on the thousands of homeowners, Tribal members, and commercial fishermen in the Puget Sound region. It must be remembered that we are a court of limited jurisdiction. Moreover, we are bound by the Constitution's Supremacy Clause which accords special standing to treaties. We do not have the power simply to "rewrite the Treaties or interpret the Treaties in a way contrary to settled law simply to avoid or minimize any hardship" to any of the parties in this case. *Shellfish I*, 873 F.Supp. at 1429. This case has come a long way since the 1970's when a "total lack of meaningful communication" led to "deep distrust" between the parties. 384 F.Supp. at 329-30. The parties have apparently made sincere efforts to settle this dispute; we hope that our decision assists and renews that effort.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS.

The parties shall bear their own costs of this appeal.

BEEZER, Circuit Judge, Concurring:

I specially concur in the opinion of the court. I express my views concerning the interpretation of the Stevens Treaties and the appointment of special masters.

The Stevens Treaties provide:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: Provided, however, that they shall not take shell fish from any beds staked or cultivated by citizens.

Treaty of Medicine Creek, December 26, 1854, 10 Stat. 1132, Art. III (it is undisputed that this clause is substantively identical in all subject treaties).

The United States asks us to hold that shellfish beds, unharvested in the nineteenth century, were "usual and accustomed" tribal fishing grounds in 1854. This argument strains even the deferential canons of Indian treaty interpretation. It is, however, the law of this case and of the Supreme Court that the reserved fishing right makes no distinctions between migratory fish and shellfish or between fish runs and static fishing grounds. The origin of this rule of law is perplexing.

In 1974, Judge Boldt concluded that the Indian Tribes had treaty fishing rights which entitled them to harvest up to fifty percent of fish passing through the tribes' fishing grounds. United States v. Washington, 384 F.Supp. 312 (W.D.Wash.1974) ("Boldt Decision"), aff'd, 520 F.2d 676 (9th Cir.1975), cert. denied, 423 U.S. 1086 (1976). The Supreme Court "substantially upheld" the Boldt Decision in Washington v. Fishing Vessel Ass'n, 443 U.S. 658, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1978). United States v. Suquamish Indian Tribe, 901 F.2d 772, 773 (9th Cir.1990). The Boldt Decision held that the fishing right is "not limited as to species of fish." Boldt Decision, 384 F.Supp. at 401.

Fishing Vessel held that tribes have a right to equal amounts of fish "taken from runs of fish that pass through the Indians' usual and accustomed fishing grounds." Fishing Vessel, 443 U.S. at 689. A tribe's rights are defined in case law by the grounds the tribe fished and not the particular species taken. The Indians reserved the "right to take a share of each run of fish that passes through tribal fishing areas." Id. at 679. Implicit in the Fishing Vessel opinion is the principle that to limit access strictly to historical fishing grounds and species would render the right to fish a nullity because citizens

could harvest all fish downstream. Similarly, in United States v. Winans, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905), the Court determined that the issuance of a license to erect a fishing wheel where the device deprived Indians of the run of fish that passed through their usual and accustomed fishing grounds was impermissible.

The underpinning of the Court's interpretation of the Stevens Treaties should not apply to shellfish because they are, with the exception of crustaceans, immobile. There can be no device that prevents the migration of immobile shellfish to, through or from the tribes' usual and accustomed fishing grounds.

The burden imposed by our opinion cannot be overstated. The record in this case makes abundantly clear that since treaty times a vibrant shellfish industry has developed in the State of Washington along the saltwater beaches of the Pacific Ocean and along tidelands adjoining the inland waters of Puget Sound.

The labors of a modern day shellfish producer are vividly recounted in The Seattle Times, May 1, 1997, p. B-1, as follows:

> After all, one of the first skills he found necessary was the patience to stare for 10 hours at a time at a leathery, slithering geoduck neck sticking out of a plastic bucket full of sand--waiting to catch the unlovely bivalve in its private, and very erratic, act of spawning. Complicating the task is the fact that geoducks must spawn before hatchery breeders, such as Dahman, can tell the males from the females.
>
> "It's maddening stuff. These geoducks can make a long day of it for you," says Dahman. His tattered logger's clothing and irreverent rants about biologists and bureaucrats belie the mix of genetics, mechanical engineering, global marketing and money going into this venture.
>
> "The idea here is to grow geoducks where we've never been able to grow anything before. We're still crawling at all this."
>
> For Dahman, the first baby steps will come this fall when he harvests the initial crop of hatchery-reared geoducks planted on his south Puget Sound tidelands outside of Shelton four years ago.

> Dahman Shellfish and its neighbor, Taylor United, one of the state's biggest shellfish growers, are believed to be the first in the U.S. commercially raising geoducks--a forerunner, predict aquaculture experts, to eventually breeding such edible if weird-looking creatures as sea cucumbers and sea urchins in the lab.

Citizens--as well as tribal members and the state--have long set aside suitable tidelands acquired by purchase, by inclusion in reservation boundaries or by dedications adjoining state lands to the cultivation of clams, oysters and other species of shellfish. The opinion we file today will open these tidelands to the harvest of commercially valuable shellfish by the Tribes in common with the citizens as a matter of treaty right.

It is now clear that the Tribes are granted access to tidelands which contain cultivated shellfish produced by the Growers. The details of how much and when the Tribes may harvest shellfish from such lands remains unresolved. We assign the Growers "the burden of proving pre-enhancement harvest versus post- enhancement harvest." The district court will be faced with the application of this scheme. Our suggestion shifts the law that the party asserting a treaty right must prove that right. See, e.g., United States v. Lummi Indian Tribe, 841 F.2d 317, 318 (9th Cir.1988) (a tribe asserting usual and accustomed fishing grounds has the burden to produce evidence that a particular location was customarily used at treaty time). The assignment of the burden of proof is critical. The district court, after hearing testimony, determined that it "would be very difficult--if not impossible--to develop a 'snapshot' of existing shellfish beds at the time commercial development commenced on the Growers' property." Shellfish II, 898 F.Supp. at 1462. Where a disputed fact cannot be proven, the placement of the burden of proof is dispositive. The Growers' burden is heavy and the district court's assignment is daunting.

The tension between grower and Indian under treaty provisions is clear. One will not grow shellfish on lands bearing natural shellfish to provide subsistence to the other without compensation for the damage occurring to the cultivated shellfish. The majority asks the parties to "constructively ... work together to respect each others' rights." I fear the time for that has passed. The fact that the Tribes are concerned about the Growers' "gaping loophole" to deny them access to naturally occurring shellfish by never allowing their beds to be free of oyster crops evidences the tension between the parties. Burden of proof and access issues that

remain unresolved in the opinion we file today guarantee continuing disputes between the tribes and the citizens of Washington State.

Property rights, which have been undisturbed for generations, are encumbered by our decision today. In Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dal.) 304, 310, 1 L.Ed. 391 (Cir.Ct.Pa.Dist.1795), Justice Patterson observed:

> From these passages it is evident; that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man. Men have a sense of property: Property is necessary to their subsistence and correspondent to their natural wants and desires; its security was one of the objects, that induced them to unite in society. No man would become a member of a community, in which he could not enjoy the fruits of his honest labour and industry. The preservation of property then is a primary object of the social compact, and, by the late Constitution of Pennsylvania, was made a fundamental law.

Property rights, so fundamental to American government, need not be trampled upon. Exclusive use of private tidelands by commercial growers should not deprive the Tribes of their treaty share of shellfish; the Tribes could be allocated half of the naturally occurring shellfish without disturbing the hard-earned and long-held property rights of private growers. Shares of the shellfish taken, of course, need not be determined by the place where the shellfish are taken.[1] Thus, a tribal share of shellfish could come from reservation land, government land or private tidelands acquired by the tribe.

Survival of Washington's shellfish industry depends upon the growers' ability to dedicate tidelands to exclusive use. This cannot be done under existing case law interpretation of the Stevens Treaties. We are, however, bound, by the authority of the Supreme Court and the law of the case, to that interpretation. Exclusive use of tidelands will be possible if the Supreme Court recognizes the shellfish proviso with respect to "cultivation" and makes clear the distinctions between migratory fish and shellfish; between fish runs and static fishing grounds; and between natural shellfish and cultivated shellfish.

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[1] Fishing Vessel makes this point clear. The Court held that "fish taken by treaty fisherman off the reservations and at locations other than 'usual and accustomed' sites ... [are] to be counted as part of the Indians' [treaty] share." Fishing Vessel, 443 U.S. at 687 n. 29.

II

The district court held that, upon proper showing and subject to time, place and manner restrictions, the Tribes are entitled to cross private property in order to exercise their shellfishing rights. United States v. Washington, 909 F.Supp. 787, 792 (W.D.Wash.1995). If a dispute arises between a property owner and a Treaty Tribe, concerning the exercise of the Shellfish Treaty right, the matter is to be resolved by a special master. Id. The Tribes, the State of Washington, the Shellfish Growers and the Private Property Owners each are permitted to designate a special master, one of which is to be selected at random to resolve a pending dispute. Id. at 793-94. The special master is to issue a written report and recommendation subject to approval and adoption by the district court. Id. at 794. The opinion filed today holds that "due process is violated" because "there is a seventy-five percent chance that Appellants' master will be selected." We vacate and remand to the district court to reconfigure the appointment of special masters.

Fed.R.Civ.P. 53(a), which governs the appointment of special masters, states in pertinent part, "[t]he court in which any action is pending may appoint a special master therein." Reference to a master "shall be the exception and not the rule" and shall be made "upon a showing that some exceptional condition requires it." Burlington Northern v. Dep't of Revenue, 934 F.2d 1064, 1071 (9th Cir.1991) (quoting Fed.R.Civ.P. 53(b)). "The use of masters is 'to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause,' and not to displace the court." La Buy v. Howes Leather Co., 352 U.S. 249, 256, 77 S.Ct. 309, 1 L.Ed.2d 290 (1956) (quoting Ex Parte Peterson, 253 U.S. 300, 40 S.Ct. 543, 64 L.Ed. 919 (1920)). "Litigants are entitled to a trial by the court, in every suit, save where exceptional circumstances are shown." Id. at 258. "Congestion in itself is not such an exceptional circumstance as to warrant a reference to a master." Id. at 259; see also Wright & Miller, Federal Practice and Procedure: Civil 2d § 2601 (1995) (the appointment of a master is for the purpose of assisting the court to obtain facts). "The Courts have tended to read Rule 53 narrowly, closely circumscribing the range of circumstances in which reference to a master is appropriate." Burlington Northern, 934 F.2d 1071 (quoting In re Armco, 770 F.2d 103, 105 (8th Cir.1985)).

Referral to a special master is reviewed for an abuse of discretion. Burlington Northern, 934 F.2d at 1071 (citing United States v. Suquamish Indian Tribe, 901 F.2d 772, 774 (9th

Cir.1990)). We have affirmed the use of special masters repeatedly in the Stevens Treaty cases. See, e.g., Suquamish Indian Tribe, 901 F.2d at 775 (noting that we could "not think of a more comprehensive and complex case than" the Boldt decision and its successors); see also United States v. Washington, 730 F.2d 1314 (9th Cir.1984). In the present matter, however, the district court made no finding that disputes regarding whether tribes must pass over private land to harvest shellfish is complex or extraordinary. Indeed, disputes are likely to present straightforward trespass and property questions. Because the district court did not make a finding of complexity or exceptional circumstance as required under Rule 53, referral to a special master is not yet appropriate.

Neutrality of the special master is also a paramount concern. In the Stevens Treaty cases, prior referrals have been to a magistrate judge, not a master selected by the parties. See, e.g., United States v. Washington, 626 F.Supp. 1401 (W.D.Wash.1985). The Supreme Court has long held that "due process implies a tribunal both impartial and mentally competent to afford a hearing." Jordan v. Massachusetts, 225 U.S. 167, 176, 32 S.Ct. 651, 56 L.Ed. 1038 (1912); see also Marshall v. Jerrico, Inc., 446 U.S. 238, 242, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980) ("The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases."). The neutrality requirement helps guarantee that life, liberty or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law and preserves the appearance and reality of fairness. Marshall, 446 U.S. at 242. A party may establish that he has been denied his constitutional right to a fair hearing before an impartial tribunal by a showing of actual bias or the adjudicator's pecuniary or personal interest in the outcome. Stivers v. Pierce, 71 F.3d 732 (9th Cir.1995). In addition to the constraints of due process, Canon 1 of the Code of Conduct for United States Judges sets the integrity and independence of the judiciary as an indispensable goal. Administrative Office of U.S. Courts, Code of Judicial Conduct for United States Judges (1997).

The masters here are selected by the parties, presumably because the candidates are likely to rule favorably. Whether each side is permitted to designate one or many potential candidates, the result is a master that is chosen because of a real or perceived bias. Even if the district court ultimately approves the selection of the master and adopts the master's report and recommendation, that does not cure the error. A property owner subject to an unforeseen access easement or a tribe denied access to a harvest will find little solace in the judge's signature adopting the special master's findings.

I would hold that the special master selection process adopted by the district court violates due process. I would remand to the district court to make findings supporting the necessity for a master; to appoint an independent special master and to give special consideration to the appointment of a magistrate judge.

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873 F. Supp. 1422

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, et al.,	)	
	)	No. CV 9213
	)	
Plaintiffs,	)	Sub-proceeding
v.	)	NO. 8903
	)	
STATE OF WASHINGTON, et al.,	)	MEMORANDUM
	)	OPINION
Defendants.	)	AND ORDER
	)	

December 20, 1994

MEMORANDUM OPINION AND ORDER

RAFEEDIE, District Judge

I. INTRODUCTION

A. History of the Case

This sub-proceeding, filed by the United States and 16 Indian Tribes,[1] involves the Stevens Treaties[2] which were interpreted in *United States v. State of Washington*, 384 F.Supp.

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[1] The Tribes active in this sub-proceeding are the following: the Tulalip, Puyallup, Squaxin Island, Makah, Muckleshoot, Upper Skagit, Nooksack, Nisqually, Lummi, Skokomish, Port Gamble S'Klallam, Lower Elwha S'Klallam, Jamestown S'Klallam, Suquamish, Yakama, and the Swinomish (*hereinafter* "The Tribes"). The Quinault, Quileute, and Hoh Tribes, all coastal Tribes, made appearances in the action; however, they were not active participants, and they sought no relief.

[2] The treaties are called the "Stevens Treaties" because of the participation in the negotiations of all of the treaties by Territorial Governor Isaac Stevens. Each of the Tribes involved in this sub-proceeding are the successors in interest to one or more of the following treaties: Treaty of Medicine Creek, December 26, 1854 (10 Stat. 1132); Treaty of Point Elliott, January 26, 1855, (12 Stat. 927); Treaty of Point No Point, January 26, 1855 (12 Stat. 933); Treaty with the Makah, January 31, 1855 (12 Stat. 939). *Hereinafter* "The Treaties."

312 (W.D. Wash. 1974) (*hereinafter Washington I*); *aff'd*, 573 F.2d 1123 (1978) (*hereinafter Washington II*); *aff'd in substantial part*, 443 U.S. 658 (1979). The parties filed this action seeking a declaration of the nature and extent of tribal off-reservation shellfishing rights, an the extent to which such rights may be affected by the following limiting provision ("the Shellfish Proviso"): "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory . . . *Provided, however, that they shall not take shellfish from any beds staked or cultivated by citizens*."[3]

Washington I was decided in 1974. At that time, the Court reserved jurisdiction to hear other unresolved issues arising out of the Stevens Treaties. In *Washington I*, the issue before the Court was the nature and extent of the treaty Tribes' off-reservation fishing rights with respect to anadromous fish. That decision established the locations of the Tribes' usual and accustomed grounds and stations and found that the Tribes were entitled to take 50% of the harvestable fish from those grounds and stations. Subsequently, the Supreme Court substantially affirmed the decision finding that the trial court had correctly adjudicated the nature and extent of the Tribes' fishing rights. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) (*hereinafter Fishing Vessel*).

Thus, the treaty Tribes' rights with respect to anadromous fish in the Puget Sound are is the law of the land. Finally, on September 2, 1993, consistent with *Washington I* and *Fishing Vessel*, this Court ruled that "shellfish" are "fish," within the meaning of the Treaties. Thus, the treaty Tribes' right to take shellfish is limited, if at all, only by the Shellfish Proviso in the Treaties or to the extent that the Court finds the Moderate Living Doctrine to be applicable from the evidence and the law.

B. The Parties' Contentions

In this action, the tribal plaintiffs seek the following declaratory relief: (1) that they have the right to take 50% of all of the species of harvestable shellfish that may be safely harvested within their usual and accustomed grounds and stations; (2) that

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[3] This language is taken from the Treaty of Medicine Creek; however, the parties admitted that all of the Stevens Treaties contain substantially similar language.

the usual and accustomed grounds and stations are those previously adjudicated in *Washington I*; (3) that the phrase "staked or cultivated by citizens" in the Shellfish Proviso be interpreted to mean only those non-natural beds that have been staked or cultivated; (4) that the right to take shellfish extends to natural clam beds that exist under the artificial shellfish beds; (5) that the Tribes' authority to regulate the harvest be confirmed; (6) that the Court order co-management of the resource between the Tribe and the State; (7) that the Court enjoin the application and enforcement of specific state statutes which the Tribes claim would be discriminatory in practice; (8) that the Upper Skagit Tribe is the successor to the Nuwha'ha and the Bsigwigwilts and is therefore entitled to take shellfish at the usual and accustomed grounds and stations of the Nuwha'ha and Bsigwigwilts; and (9) that the Yakama Nation has not established any usual and accustomed grounds and stations and thus is not entitled to take shellfish.

Because the Court has found that shellfish are fish, only a limited issue is currently before the Court, namely the effect of the Shellfish Proviso and the nature and scope of the remedy to be granted.

Opposing the plaintiffs are the State of Washington and the intervenors[4] who contend that the "staked or cultivated" provision protects state and private property from shellfishing by the Tribes. Alternatively, but in a similar vein, the intervening shellfish growers argue that the lands which they own or occupy and upon which they conduct the business of shellfish growing have been "staked or cultivated" within the meaning of the Treaties' Shellfish Proviso, hence they conclude that those lands should be exempted from tribal shellfishing under the treaties.

C. Canons of Interpretation

In interpreting the Shellfish Proviso, in general, the Court is bound by both general rules of interpretation, and thespecific rules handed down by the Supreme Court which apply when Indian Tribes assert treaty rights. In particular, the Court must use

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[4] The action was filed originally against the State of Washington. Later in the proceeding the following groups intervened as defendants: the Puget Sound Growers Association; UPOW, the United Property Owners of Washington; and the "Adkins Party," a group of about 20 private property owners. The main representative of the "Adkins Party" are Adkins, Carter, and Alexander.

special canons of construction to determine the meaning of Indian treaties, all of which amount to the same proposition: "[A]mbiguities occurring will be resolved from the standpoint of the Indians." *Winters v. United States*, 207 U.S. 564, 576 (1908). Similarly, treaties with Indians "are to be construed, so far as possible, in the sense in which the Indians understood them, and 'in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.'" *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1443) (quoting *Tulee v. Washington*, 315 U.S. 681, 684 (1942)).

These canons of construction, however, do not give the court license to interpret a treaty according to the Indians' preferences. The Supreme Court has left no doubt that "even Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties." *Choctaw Nation*, 318 U.S. at 432. Such an exercise "would be an intrusion upon the domain committed by the Constitution to the political departments of the government." *Choctaw & Chickasaw Nations v. United States*, 179 U.S. 494, 532 (1900).

Finally, in *United States v. Winans*, 198 U.S. 371 (1905), the Supreme Court adopted a "reservation of rights" approach in interpreting treaties with Indian Tribes. In *Winans*, the controversy arose when the settlers, who owned the land fronting the Columbia River, denied Indians access to the river abutting their land and by exercising their rights under state licenses to operate "fish wheels." The fish wheels, as admitted by the parties, gave the landowner "exclusive possession of the fishing places" by obstructing the Indians' access to the fishing areas. *Id.* at 382.

Rejecting the landowner's arguments, the Supreme Court established a new theory of treaty interpretation: a treaty is not a grant of rights *to the Indians*, but a grant of rights *from them*, thereby implicitly containing a reservation of those rights not explicitly granted. Further, the Supreme Court found that such reservations of rights encompassed all the territory subject to the treaty, thereby imposing a "servitude upon every piece of land." *Id.* at 381. Thus, the Court concluded that the starting point for analysis of the treaty is the Indians' pre-existing rights.

With respect to general canons of treaty construction, the Court beings with the premise that the parties' intentions dictate the interpretation of a treaty. *Choctaw & Chickasaw Nations*, 179 U.S. at 531. In determining those intentions, the Court must

interpret words in a treaty according to their natural and ordinary meanings, when the words are unambiguous. *Id.* It is only when a court finds a word to be ambiguous that it may resort to extrinsic evidence. *Id.*

In addition, treaties may, when necessary, be interpreted in light of the surrounding historical circumstances. *Choctaw Nation v. United States*, 318 U.S. 423 (1943). Thus, the Court looks to the historical context surrounding the negotiations of the Stevens Treaties. The Court also finds the following canons of construction instructive: (1) a treaty should not be interpreted so as to render one part inoperative, *Colautti v. Franklin*, 439 U.S. 379, 392 (1979); (2) when the parties could have more easily expressed a particular intent by an alternative choice of words, the chosen words can be interpreted NOT to express that intent, *Choctaw & Chickasaw Nations v. United States*, 179 U.S. 494, 538 (1900); and (3) that the practical construction adopted by the parties, namely post-treaty conduct, may be viewed to help determine the meaning of the treaty. *Choctaw Nation v. United States*, 318 U.S. 423, 434 (1943).

Following these canons of construction, the Court finds that, when signing the Treaties at issue, the Tribes reserved the right to take shellfish from their usual and accustomed grounds and stations, subject only to the Shellfish Proviso. Furthermore, the words "staked or cultivated" in the proviso are ambiguous, and the Court concludes that the Shellfish Proviso does not apply to a natural or native beds and that, under the Shellfish Proviso, artificial beds may be staked or cultivated, notwithstanding their location in private tidal lands. The Court interprets these relevant words in this way because of the reservation of rights by the Tribes, the historical context of the treaties, and the rules favoring the resolution of ambiguities in favor of Indian Tribes; in addition, the Court finds the plaintiffs' evidence as to the meaning of these words to be much more compelling and persuasive than the evidence opposed to it.

D. Interpretation of the Proviso and Allegations of Hardship

In this sub-proceeding, the Court was not asked to determine which tidelands or marine areas contain natural beds open to Indian fishing, and which contain artificial beds, those staked or cultivated beds not open to Indian fishing; thus this decision does not resolve those issues. Rather, this decision is meant only to determine the meaning of the Shellfish Proviso in

the Stevens Treaties and what effect it has on the tribal right to take shellfish.

In reaching its decision, the Court may not rewrite the Treaties or interpret the Treaties in a way contrary to settled law simply to avoid or minimize any hardship to the public or to the intervenors. Indeed, the Court has no such power. Rather, amelioration from such hardships should be sought from Congress, which has the power to abrogate the treaty, or from the State of Washington, which sold the public tidelands without notice to the buyers of the pre-existing tribal fishing rights, and indeed the United States, which permitted such sales to occur without taking steps to secure such fishing rights.

II. INTERPRETATION OF TERMS IN THE STEVENS TREATIES

The resolution of the parties' contentions in this sub-proceeding depends on the interpretation of the Stevens Treaties. The Court had occasion to interpret some of the relevant language in *Washington I*, and finds those interpretations binding in this action. The language of the Shellfish Proviso however, has not been interpreted by the Court; thus, an extensive discussion of language and the meaning of the language is necessary.

A. Prior holdings

1. The Right of Taking Fish Includes the Right to Take Shellfish

The Court held on September 2, 1993, that the "right of taking fish" in the Stevens Treaties includes the right to take shellfish. The Court reached this conclusion without reference to the canons of constructions favoring Indians. Indeed, this interpretation is compelled by the plain language of the Treaties.

As previously discussed, the Shellfish Proviso limits the Tribes' right to take shellfish to those beds not "staked or cultivated" by citizens. This Proviso, plainly read, constitutes an exception to the right of taking shellfish at particular locations. It inevitable follows that shellfish were included in the "right of taking fish" referred to in the first sentence.[5] This interpretation

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[5] The Court does not believe that such a right can be found in the provisions reserving the Indians' right to hunt, gather roots and berries, and pasture horses.

is consistent with the principle that a treaty "should be interpreted so as not to render one part inoperative." *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). If the right of taking "fish" did not include shellfish, the entire shellfish proviso would serve no purpose.

2. The Right to Take Fish is not Limited to any Particular Species of Fish

Defendant and the intervenors have argued that the "right of taking fish" must be limited to those species of fish the Tribes actually took prior to the signing of the Stevens Treaties. At that time, however, the Tribes had the absolute right to harvest any species they desired, consistent with their aboriginal title. *See Lac Court Oreilles Band, Etc. v. Voigt*, 700 F.2d at 352. The fact that some species were not taken before treaty time--either because they were inaccessible or the Indians chose not to take them--does not mean that their *right* to take such fish was limited. Because the "right of taking fish" must be read as a reservation of the Indians' pre-existing rights, and because the right to take *any* species, without limit, pre-existed the Stevens Treaties, the Court must read the "right of taking fish" without any species limitation.

The effort by the defendants to read a species limitation into the "right of taking fish" must fail in light of the canons of construction favoring Indians. Defendant and the intervenors ask the court to impose a limit on the "right of taking fish" without pointing to any treaty language in support of that interpretation. This is impermissible under *Winters* and *Choctaw Nation*. Moreover, had the parties to the Stevens Treaties intended to so limit the right, they would not have chosen the word "fish," a word which fairly encompasses every form of aquatic animal life. "Fish" has perhaps the widest sweep of any word the drafters could have chosen, and the Court will not deviate from its plain meaning.

3. "All Usual and Accustomed Grounds and Stations"

Washington I made a series of determinations as to the meaning and import of the phase "usual and accustomed grounds and stations," in the context of adjudicating where the plaintiff Tribes enjoyed the right to fish for salmon and steelhead. No party to this sub-proceeding has challenged these determinations, and the Court finds, as explained below, that they are the usual and accustomed grounds and stations for shellfishing.

At trial, the Tribes presented evidence establishing areas in which they historically sought shellfish. However, before considering this evidence, the Court must resolve a preliminary issue of treaty interpretation: whether the usual and accustomed areas for shellfish can, as a matter of law, differ from the areas adjudicated in *Washington I* for salmon and steelhead. If the Court determines that they cannot, then the areas established in *Washington I* control this sub-proceeding as well.

The Court finds that, as a matter of treaty interpretation, the Tribes' usual and accustomed grounds and stations cannot vary with the species of fish. This conclusion is consistent with the Court's prior ruling finding the Tribes' usual and accustomed grounds and stations for herring as co-extensive with those for salmon and steelhead. *See Post-Trial Decisions*, 459 F.Supp. at 1048-50. Indeed, the Court has never focused on a particular species of fish in determining the Tribes' usual and accustomed grounds and stations. *See e.g.*, *Washington I*, 384 F.Supp. at 360, 364, 372; *Post-Trial Orders*, 626 F.Supp at 1467, 1528-29.

Therefore, the Tribes have the right to take shellfish at those usual and accustomed grounds and stations adjudicated in *Washington I*, including all bedlands and tidelands under or adjacent to those areas. In addition, however, the Upper Skagit Tribe, seeks to establish its usual and accustomed grounds and stations as those of the Nuwha'ha and the Bsigwigwilts, as well as other predecessor tribes. *See infra* Part VII. Other than the evidence put on by the Upper Skagit, the Tribes have stipulated in this sub-proceeding not to present evidence proving usual and accustomed grounds and stations beyond the prior-adjudicated grounds and stations.

4. "In Common With All Citizens"

The meaning of the term "in common with all citizens" is well-settled. "Both sides have a right, secured by treaty, to take a fair share of the available fish." *Fishing Vessel*, 443 U.S. at 684-85. According to the Supreme Court, to determine this "fair share" a court should "initially divide the harvestable portion of each run . . . into approximately equal treaty and non-treaty shares, and should then reduce the treaty share if tribal needs may be satisfied by a lesser amount." *Id.* at 685. The lower boundary--this "lesser amount"-- is determined by analyzing the tribes' "moderate living" needs. *See infra* Part IV. The important

concept here, however, is that the "in common with" language guarantees the Tribes a share of the fish and an "equal opportunity" to catch the fish. See *Fishing Vessel*, 443 U.S. at 679.

B. The Shellfish Proviso: "Any Beds Staked or Cultivated by Citizens"

1. Interpretations Proposed by the Parties

The intervening growers' proposed interpretation of the Shellfish Proviso starts and ends with the treaty-time dictionary. They argue that the Court should interpret "staked" and "cultivated" according to their dictionary definitions; essentially, this would mean that any shellfish bed extant today that is surrounded by stakes, or in some fashion improved by human labor, would be off limits to the Indians. The Tribes do not dispute that, under the definition of the treaty words advanced by the growers, all of the tideland owned or leased by the Growers falls within the Shellfish Proviso.

The intervening property owners depart to some extent from this literal approach arguing that "staked" should be interpreted in its "frontier" context and thus should be regarded as a synonym for "claimed as private property." Therefore, all privately-owned tideland, whether or not surrounded by stakes, would be protected by the Shellfish Proviso.

The Plaintiff Tribes' argue first that the terms "staked" and "cultivated" must be interpreted as they were *used* in the shellfishing industry at treaty time. This *usage* of the terms "staked" and "cultivated" by the shellfishing industry has two elements: the doctrinal definition and the empirical definition of the words, which is informed not by a dictionary, but by the actual practices of the shellfishing industry. Thus, while the doctrinal definition of the words might contemplate a broad set of activities, the empirical definition captures that narrower subset of activities that were actually performed at treaty time.

As will be shown below, the Tribes presented compelling evidence that only artificial beds were "staked" and "cultivated" at treaty time.

2. *"Doctrinal Definition" of Shellfish Proviso Terms Within Shellfishing Industry*

a. "BEDS"

The intervening growers presented evidence at trial that shellfish "beds," as that term was used at treaty time, included both natural and artificial shellfish deposits. Ingersoll's Glossary of Shellfish Terms ("Ingersoll's") defines "bed" as "The bank, reef or deposit of oysters in the water, either growing naturally or artificially, original or transplanted." The Tribes have not disputed Ingersoll's as the appropriate definition, and the court will rely upon that definition in its analysis.

b. "STAKED"

The parties agree that the words "stake" and "staked" were commonly used in the shellfishing industry at treaty time. To "stake" a shellfish bed meant to plant stakes or other markers to indicate the boundaries of the bed.

c. "CULTIVATED"

Within the shellfishing industry at treaty time, the meaning of the terms "cultivate" and "cultivated" was quite narrow. Ingersoll's defines "cultivate" as "to raise oysters artificially from spawn, or from transplanted young."

The defendant and the intervenors have presented no evidence to directly contradict Ingersoll's definition of "cultivate." The intervening growers have shown that nineteenth-century oyster farmers performed a variety of activities to improve their harvest. Indeed, Moore states in his treatise that "all methods of oyster culture depend for their success upon the modification of the natural conditions in such a manner as to bring about one or several of the following results," such as the increase in the number of eggs and the increase in the surfaces available for fixation.

Reading Ingersoll's and Moore together, cultivation is the "modification of natural conditions" occurring after the oysters have been planted or transplanted in an artificial bed.

3. *"Empirical Definition" of the Terms "Staked" and "Cultivated" as They Were Used in the Shellfishing Industry*

At trial, the Tribes presented substantial evidence of the actual use of the terms "staked" and "cultivated" within the shellfish industry. This evidence falls into two categories. First, the Tribes attempted to reconstruct, state-by-state, the legal landscape governing the shellfish industry. The Tribes argue that at the time the Treaties were negotiated, the shellfishing laws almost universally prohibited the "staking" or "cultivating" of natural shellfish beds. Second, the Tribes presented evidence of actual shellfish industry practices, both on the East Coast and in Shoalwater Bay, Washington. The Tribes maintain that these practices, as might be expected, conformed to the laws governing the industry, thus no actual "staking" or "cultivating" of natural beds occurred at that time.

a. Laws Governing Shellfishing Practices

As part of an 1876 report, "On the Oyster Industries of the United States," Lieutenant Paul DeBroca authored a chapter entitled "Oyster Culture," in which he described "American ostriculture" as consisting of the "planting of mollusks on those parts of the coast where the submarine soil is best fitted by its nature to fatten them and promote their growth."[6] In this chapter, DeBroca makes the following critical observation:

> Whatever may be the locality chosen by the planters, they can in no case pursue their industry on the natural banks of oysters, the common property of the people, or in any way interfere with the free exercise of navigation.[7]

DeBroca defines "natural bank" as a "conglomeration of mollusca presenting a character of continuity, constituting what is usually called an oyster-bed."[8]

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[6] PL-237 at 296.

[7] *Id.* at 297.

[8] *Id.* at 297. DeBroca elaborates:

> The natural bank may be single or formed of several small banks, separated by greater or less spaces, but always sufficiently connected to be considered parts of one whole. As to places where, through

DeBroca's characterization of the legal landscape regarding natural shellfish beds is supported by the statutes and case law in force during the mid to late nineteenth-century.[9]

For example, a series of laws were enacted in the Washington territory concerning oysters and oyster cultivation after the signing of the Stevens Treaties.[10] Despite the fact that

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accidental circumstances, isolated oysters have developed, they are not classed among the natural beds, since, if this were the case, the largest part of the submarine soil of the coast would be under interdiction and oyster culture would be impossible. However protective the American laws may be in what concerns public property, they are careful not to interfere with private enterprise by a too rigorous interpretation of the term *public property*.

DeBroca at PL-297.

[9] *See also* Angell, Treatise on the Right of Property in Tidewater (1847), PL-428 at 139 ("Oysters . . . . may be taken and thus become the property of him who takes them, and if he plants them in a new place flowed by tide water, visibly denoted, and *where there are none naturally*, and for his own particularly benefit, it is not regarded as an abandonment of his property in them," (emphasis added).

[10] The following laws were passed in the Washington Territory:

(1) An Act for the Preservation of Oysters in Shoalwater Bay, January 13, 1855:

> And be it enacted, that it shall not be lawful from and after the first day of June, until the first day of August, yearly, and every year, for any person or persons to rake, scrape, or gather any oysters from any of the oyster beds in Shoalwater Bay under any pretense, whatsoever; Provided, that nothing in this section shall be so construed as to prohibit any persons from taking oysters from beds planted out by him or them.

2. An Act to Encourage the cultivation of Oysters, January 16, 1861:

> Be it enacted . . . . That any person, being a citizen of this Territory, who has planted, or who hereafter may plant oysters in any bay or arm of the sea, *where there are no natural beds of oysters*, within or bordering upon this Territory, may acquire, by conforming to the requirements of this act, an exclusive right for such a purpose . . . .

the laws post-date the Treaties, the court nevertheless considers them important. First, each of these enactments, including the law related to Oyster preservation in Shoalwater Bay, provides separate treatment of natural and planted oyster beds. Second, the legislation, beginning with the 1861 Act to Encourage the Cultivation of Oysters, conforms exactly to DeBroca's characterization and permits the planting of oysters in areas except where natural oyster beds exist. Finally, these post-treaty enactments, by specifically recognizing property rights in planted oyster beds, imply that there was no common law property rights in planted beds, let alone natural beds, at or before treaty time.[11]

Moreover, many laws from other states also demonstrate the general rule of no staking or cultivating of natural beds. [12]

> The person desiring the benefits of the preceding section, shall cause the place or portion he desires to claim, to be marked so far as is practicable with stakes or other artificial marks at the corners. . . . and shall make, before some officer qualified to administer oaths, an affidavit that he has taken the premises so described, for the purpose of planting oysters, and that he has planted, or is about to plant oysters thereon, that said premises are not upon ad do not include any natural bed of oysters . . . .

3. An Act to Encourage the Cultivation of Oysters, January 24, 1863. Contains same language as 1861 law.

4. An Act to Encourage the Cultivation of Oysters, November 5, 1873. Contains same language as 1861 law.

5. An act to Amend an Act Entitled An Act to Encourage the Cultivation of Oysters, November 6, 1877. Contains same language as 1861 law.

[11] On the other hand, the Growers point out that in 1864, the Washington Territorial Legislature passed "An Act to Authorize Wm. Horton, Wm. N. Horton and Wm. A. Busey, their Heirs and Assigns to Plant, Cultivate and Gather Oysters on Totten's Inlet." This Act gave the named individuals "the exclusive privilege to plant, cultivate and gather oysters in so much of Totten's Inlet as lies within [designated limits]." Under the terms of this grant, it is possible that the grantees would enjoy private property rights in natural oyster beds. However, the Court does not consider this single grant to three individuals to constitute a significant part of the legal landscape in the Washington Territory.

[12] The following are laws and cases from other states that reflected the general rule of no staking or cultivating of natural beds: An Act Concerning Oysters, April 28, 1851 (Ca.); An Act Regulating and Protecting the Planting of Oysters, June 23, 1855 (Conn.); An Act in Addition to an Act Entitled "An Act

This survey of laws and statutes, both from the East Coast and California, is consistent with DeBroca's characterization of the legal landscape, namely that one could not stake off and appropriate for private use a natural oyster bed at or before treaty time. Indeed, most of the statutes from these areas created new private property rights in *planted* beds, thereby implying that *before* passage of the legislation, no such rights existed.

b. Actual Shellfishing Practices

i. East Coast Practices

For the most part, the Court will assume that practices on the East Coast conformed with the laws governing the industry. Furthermore, the Angell treatise[13] and the DeBroca article[14] indicate that oyster farming, in practice, took place on artificial beds in the nineteenth-century.[15]

ii. West Coast and Shoalwater Bay Practices

The evidence indicates that the practices at Shoalwater Bay at and before treaty time were similar to those on the East Coast. In his 1854 "Report on a Reconnaissance of the Country Lying Upon Shoalwater Bay and Puget Sound," George Gibbs made the following remark:

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for the Growing of Oysters," June 13, 1845 (Conn.); An Act to Encourage and Protect the Planting of Oysters, August 15, 1849 (Maine); An Act Concerning the Planting of Oysters, April 21, 1848 (Mass.); An Act Relative to the Fishery in Certain Waters, 1813 (N.Y.); An Act concerning oysters and terrapins and the penalties in regard to them, March 22, 1847 (Va.); *Decker v Fisher*, 4 Barb. 592, 595 (N.Y. 1848).

[13] See PL-248 at 139.

[14] See PL-237 at 286, 297.

[15] For instance, the following item appeared in *Ballou's Pictorial Drawing Room Companion* on September 9, 1855:

> The oysters here are mostly brought in the spring from the coasts of Virginia and Delaware and are planted about a mile from the shore, the boundaries of each man's plantation being designated by stakes, as shown in our engraving. PL-197.

> The principal trade, so far, has been in oysters, which abound on the flats. They are taken up, during the low tides of summer, from their natural beds, separated, and replanted, as in the States.[16]

Similarly, on August 26, 1854, the *Pioneer and Democrat*, a local newspaper, contained the following description of the shellfishing practice at Shoalwater Bay:

> The method of propagating oysters is to dig them up with tongs . . . When dug up, the oysters are separated from the mass and buried about low-water mark, or even to high-water mark, so that the tide may ebb and flow over them. . . .[17]

In addition, on January 6, 1855, the following appeared:

> We are credibly informed that there are some thirteen streams emptying into Shoalwater Bay; that there are then at the present time a large community, who are cultivating, in true Chesapeake Bay style, the oyster . . . .[18]

c. How Shellfish Laws and Practices Lead to an "Empirical Definition"

The shellfish laws and practices do give rise to an "empirical definition" of "staked" and "cultivated." The Court can ascertain an "empirical definition" of treaty words by viewing the words as they would have been viewed by the parties who participated in the treaty negotiations. In determining the parties' understanding of the words, the Court must consider the parties' actual experience with the words.

First of all, there is no doubt that the United States treaty negotiators were generally familiar with the East Coast shellfish industry and its practices. As outlined above, the East Coast shellfish industry followed a set of laws and practices whereby natural oyster beds were almost never "staked" or "cultivated." Furthermore, the evidence indicates that both George Gibbs and

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[16] Gibbs, PL-186 at 465.

[17] PL-236.

[18] PL-234.

members of the signatory Tribes were familiar with the shellfishing practices occurring at Shoalwater Bay at treaty time. Indeed, as discussed in the previous section, the practices at Shoalwater Bay were modeled after East Coast practice: oyster farmers cultivated oysters by transplanting them to artificial beds and under no circumstances did they "stake" or "cultivate" natural beds. The "empirical definition" is one possible construction of the terms "staked" and "cultivated."

4. Resolution of Meaning of "Any Beds Staked or Cultivated"

The Court must interpret the Shellfish Proviso giving due regard to both the canons of construction favoring the Indians and the general principles of treaty interpretation. In this section, the Court analyzes the Shellfish Proviso in light of: (1) the surrounding treaty words, (2) the record of the treaty negotiations, (3) the historical circumstances that gave rise to the Stevens Treaties, (4) the possible alternative formulations of the Shellfish Proviso, and (5) the post-treaty conduct of both parties. Thereafter, the Court will conclude by presenting its understanding of the correct interpretation of the Shellfish Proviso.

a. The Shellfish Proviso Viewed in Light of the Record of treaty Negotiations

The perspective and positions of the parties throughout the negotiation process can also shed light on the meaning of the shellfish proviso. To the extent that one party's statements--or silence--reflect its understanding of the other side's proposals, evidence of the negotiation process is persuasive evidence of the Shellfish Proviso's intended meaning.

The parties agree that the minutes of the treaty negotiations reflect no specific discussion of the Shellfish Proviso. However, certain statements in the treaty minutes are instructive as to the proper interpretation of the Shellfish Proviso, and the absence of certain statements of discussions reveals the intentions of the treating parties.

The most striking aspect of the treaty minutes is the paternal pose struck by the United States negotiators, including Governor Stevens himself. For example, Stevens made the following statement to the Tribes during the negotiations:

> I think the paper is good and that the Great Father will think so. Are you not my children and also children of the Great Father? What will I not do for my children and what will you not for yours? Would you not die for them? This paper is such as a man would give to his children and I will tell you why. This paper gives you a home. Does not a father give his children a home? This paper gives you a school? Does not a father send his children to school? It gives you mechanics and a Doctor to teach and cure you. Is that not fatherly? This paper secures your fish. Does not a father give food to his children? Besides fish, you can hunt, gather roots and berries. Besides it says you shall not drink whiskey and does not a father prevent his children from drinking the fire water?

There is no dispute that the United States negotiators intended to act in good faith towards the Indians; thus, the court cannot view the paternal tone as a strategic negotiating tactic, or as a form of sharp dealing. And, in deed, there were specific, tangible promises made by the United States to back up its paternal tone.

The one significant promise for purposes of this litigation is the promise by the United States to the Indians that they would enjoy a permanent right to fish as they always had. This right was promised as a sacred entitlement, one which the United States had a moral obligation to protect. The Indians were repeatedly assured that they would continue to enjoy the right to fish as they always had, in the places where they had always fished. There is no indication in the minutes of the treaty proceedings that the Indians were ever told that they would be excluded from any of their ancient fisheries.

The second most striking aspect of the treaty minutes is an absence of protest over the loss of shellfishing rights. It is clear from the treaty minutes that with respect to fishing rights in general, the guarantee of fishing rights was a *sine qua non* of the Indians' participation in the Treaties. The Indians repeatedly raised concerns that they would not survive if they did not have access to their ancient fisheries. Juxtaposed with these expressions of concern, and demands for continued fishing rights, is an absolute silence regarding the Shellfish Proviso. The evidence indicates that the Treaties were read and explained section by section to the Indians during the negotiation process. Yet the minutes reveal no instance where the Indians resisted the Shellfish Proviso.

Thus, the minutes of the treaty negotiations to some extent undermine the interpretations offered by the Defendant and the intervenors. Whether "staked" is taken literally to mean the planting of stakes in the tideland, or taken figuratively as the claiming of private property, it would provide a means for settlers to exclude the indians from natural shellfish beds where the Indians had always taken shellfish. This is simply inconsistent with the statements made by the United States and the absence of protest from the Tribes, both of which are reflected in the treaty minutes.

If the Shellfish Proviso merely operated to exclude Indians from artificial beds, it would not likely have been a serious point of contention during the negotiation process. As a result, this interpretation is perfectly consistent with the United States' solemn promise that the Indians would have a permanent right to their ancient fisheries.

b. The Shellfish Proviso Viewed in Light of the Historical Circumstances Surrounding the Negotiation of the Stevens Treaties

Just as the record of the treaty negotiations is direct evidence of the parties' intentions, the historical circumstances surrounding the negotiation process are indirect evidence. These circumstances provide the Court with additional information to determine the meaning of the Shellfish Proviso.

i. The United States' Purpose In Entering Stevens Treaties

The United States' motivation for entering into the Stevens Treaties was examined in *Washington I*, in *Fishing Vessel*, and by this Court based upon the evidence presented in this sub-proceeding. The United States' primary purpose was to extinguish the Indians' title to the lands in Western Washington, thereby clearing the way for settlement by Europeans. It was hoped that, by moving the Indians onto reservations, the Treaties would minimize the friction and permit amicable relations between the settlers and the Indians. Of course, the United States recognized that to achieve its primary purpose, it would have to pay some price. Further complicating matters, however, was the fact that the United States wanted to execute the Treaties as quickly as possible.

The United States was aware that the Indians used and relied on fish, including shellfish, for subsistence, ceremonial and commercial purposes; thus it was clearly necessary to preserve the Indians' fishing rights. In fact, the United States viewed this concession as serving its own interest to some extent: indeed, the treaty negotiators did not want the Indians to become dependent upon the United States for their subsistence and a reservation of fishing rights would insure against this possibility. At the same time, the United States believed that guaranteeing the Indians fishing rights would "not in any manner interfere with the rights of citizens." Finally, the United States intended to act honorably towards the Indians, and the negotiators believed that it never could have been the intention of Congress that the Indians should be excluded from their ancient fisheries and expressed among themselves the intention to preserve Indian fishing rights.

Overall, the Tribes' interpretation of the Shellfish Proviso is most consistent with the United States' purposes in entering the Stevens Treaties. The interpretation does not in any way conflict with the historical findings of fact concerning the United States' purpose in entering the Treaties. The defendant and the intervenors point to the potential conflict arising from enforcing the Tribes' interpretation of the Shellfish Proviso, and on that basis argue that the Tribes' interpretation contradicts the United States' intention to avoid conflict between Indians and settlers. The United States, however, did not intend that the Indians would relinquish their ancient fishing rights on demand by settlers. Further, under the Tribes' interpretation, there would be no conflict between Indians and settlers, so long as the Indians respected the settlers' planted oyster beds and the settlers did not stake out natural oyster beds where the Indians took fish.

The Defendants' and intervenors' proposed interpretations are also generally consistent with the United States' purposes in entering the Treaties, *except in one important respect*: neither of these interpretations is consistent with the United States' avowed intention to preserve for the Indians their ancient fisheries. Whether "staked" is viewed literally or in its frontier sense, it permits the gradual exclusion of Indians from natural shellfish beds, a result clearly unwanted and unintended by the parties to the Treaties.

ii. The Tribes' Purpose In Entering Stevens Treaties

The evidence indicates that the Tribes' purpose in entering the Stevens Treaties was to secure land and livelihood for their

members who faced an aggressive waive of European settlement. Tribal leaders and members believed that without recourse to their ancient fisheries, they would perish. Whatever land concessions they made, the Indians viewed a guarantee of permanent fishing rights as an absolute predicate to entering into a treaty with the United States.

Under the Tribes' interpretation the Indians would have a permanent right of access to their ancient fisheries. Conversely, the defendant's and intervenors' proposed interpretations of the treaty simply do not recognize that the Indians were bargaining for a permanent right; rather, they seem to rely on the proposition that the Indians believed that their need for shellfish would diminish over time. This supposition, however, lacks any evidentiary support and is contradicted by the overall weight of the evidence. Accordingly, the Tribes' position is more consistent with this facet of the Treaties' historical context.

iii. The United States' Vision for the Washington Territory

The parties agree that Governor Stevens was not a short-term thinker who was motivated solely by considerations of expediency. Both sides characterize Stevens as a self-conscious historical actor who proceeded cautiously, guided by a vision for the future of the Washington Territory. The parties even agree on some aspects of the substance of Stevens' vision for the Washington Territory; not surprisingly however, on other aspects, they sharply disagree. The Court must resolve these differences in its attempt to recreate Stevens' vision as part of the overall context in which to interpret the Shellfish Proviso.

A. Shellfish Industry in the Washington Territory

First, the parties agree that Stevens envisioned the development of a thriving oyster farming industry in the Puget Sound. Dr. Richards, an expert for the defendant and intervenors, gave the following testimony at trial:

> Q. Do you have any opinion as to whether or not Stevens and his treaty commissions envisioned similar industries [as to those in Shoalwater Bay] developing in the Puget Sound area?
>
> A. I'm sure they did. The newspapers, particularly the *Pioneer and Democrat*, mentioned the possibility of

this occurring and in fact reflected some dismay that it had not occurred already.

But certainly I think it is safe to say that they envisioned the shellfish industry as well as many other industries appearing in the territory on the Sound.

The Tribes' interpretation is most consistent with this vision. The oyster farming industry, as constituted at treaty time, was built on artificial beds. As previously discussed, transplanting oysters from natural beds and seeding artificial beds were the principal method of oyster culture at treaty time, both on the East Coast and at Shoalwater Bay. Stevens' vision of the oyster industry most likely conformed to existing practices; indeed, the record is devoid of any evidence that Stevens or any of the United States' negotiators held any ideas of reforming industry practices. Thus, to protect the fledgling oyster industry, Stevens might have felt it necessary to exempt artificial beds from the Indians' treaty right to take fish. Under the Tribes' interpretation, the Shellfish Proviso is narrowly tailored to do just that.

Under the competing interpretations, the Shellfish Proviso is not designed specifically to protect the oyster industry; depending on the circumstances, it could either aid or hinder the industry's development. To the extent it prohibited Indians from taking shellfish from both artificial and natural shellfish beds where settlers were engaging in fruitful harvesting, it would aid the development of the industry. However, both the literal and figurative interpretation of "staked" advanced by defendants and the intervenors protect activities, such as tideland ownership, wholly unrelated to the oyster industry. Under either interpretation, a settler--either by placing stakes or by claiming ownership to a tideland parcel--could preclude Indians and non-Indians from taking shellfish from natural beds located on that parcel. The settler could then ail to harvest the shellfish, and the Indians would be forbidden from fishing there. Under these circumstances, it would not foster, but instead undermine, the development of an oyster industry. Accordingly, the Tribes' proposed interpretation is preferable because it is wholly consistent with the notion of fostering the shellfish industry.

B. Tideland Development in the Washington Territory

The parties also agree that the United States negotiators anticipated industrial and urban development in the relevant geographical area, and expected that mills, ports and eventually

cities would be erected on the tidelands. Indeed, prior to treaty time, the United States engaged in numerous projects to develop the tidelands, including diking and reclamation of land, and dredging and channelization of watercourses.

The effect of development on the Shellfish Proviso is on of the most perplexing issues in this case. The Tribes have no claimed a right to take shellfish from areas where natural beds no longer exist, such as from tideland areas housing factories, the Kingdome, and mills and ports. The Tribes appear to have conceded that the some of the development along the tidelands, but not all, has extinguished their right to take fish from those particular areas. The only type of development that extinguishes the Tribes' right to take shellfish, however, is that development which also extinguishes the shellfish beds. Thus, in any area, where natural shellfish beds remain--regardless of whether the areas is privately owned or leased and regardless of the activity occurring upon the land--the Tribes' right to take fish remains.

What, then, of Isaac Stevens' vision? Stevens did not perceive a conflict between his vision of tideland development and his desire to preserve the Indians' aboriginal fishing rights. First, the United States negotiators believed that the supply of fish, including shellfish, was abundant and seemingly inexhaustible. It appeared unlikely that the tideland development would prejudice, in a tangible way, the Indians' right to take fish. Second, the United States negotiators were aware of the thriving shellfish industry in fully-developed East Coast cities, and likely assumed based on those examples that development in the Puget Sound and on the western shore would not interfere with the Indians' exercise of their treaty fishing rights. Consequently, neither the prospect nor the act of development counsel against the Tribes' interpretation of the Shellfish Proviso.

C. *Role of the Indians in the Washington Territory*

The State of Washington points out that the Stevens Treaties were negotiated during a period in which the United States adopted an "assimilation policy" towards Indian Tribes. In *Washington I*, the Court found that, at least with respect to the non-coastal tribes, the United States did envision an assimilation of Indians into western society:

> It was the intention of the United States Government, in negotiating Treaties with the Indian, to make at least non-coastal tribes agriculturists, although not restrict them to

> that, to diversify Indian economy, to reach western skills and trades to the Indians and to accomplish a transition of the Indians into western culture. There was no intent, however, to prevent the Indians from using the fisheries for economic gain.[19]

Overall, the evidence presented in this case indicates that the United States intended that Indians would, at minimum, interact with settlers in the Washington Territory, if not fully *integrate* with them. It is clear from the record that the United states intended that the Indians would continue to provide labor and to participate in the regional economy after the Treaties were signed and that the Indian would supply fish, including shellfish, to the settlers. The record in this case does not support the contention that, with respect to the Stevens Treaties, the United States intended to break down tribal affiliations of the Puget Sound Tribes and absorb the tribal members as individuals.

D. Private Ownership of Undeveloped Tidelands

There is no evidence in the record that Isaac Stevens or any of the negotiators from either side foresaw private ownership of the vast majority of tidelands and beaches of Puget Sound and western Washington.

Even if the parties anticipated the massive alienation of tidelands that occurred at the turn of the century, it does not follow that they would have expected private ownership of tidelands to have depleted or subtracted from the public fishery. To the contrary, the uniform common law at treaty time held that private ownership of a parcel of tideland did not include private rights to the shellfish on that parcel. In his 1847 Treatise on the *Right of Property in Tide Waters*, Joseph Angell opined that "[t]here is no doubt, that the public have a right to take shell-fish on the shore, though the right of soil in the shore happens to be private property."[20] Therefore, the treating parties did not view development as vacating the public's, nor the Indians,' right to fish.

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[19] *Washington I*, 384 F.Supp. at 355.

[20] *See also Peck v. Lockwood*, 5 Day 22 (Conn. 1811); *Weston v Sampson*, 62 Mass. 347 (1851); *Lakeman v. Burnham*, 7 Gray 437 (Mass. 18856); *Bickel v Polk*, 5 Har. 325 (Del. 1851); *Moulton v Libbey*, 37 Main 472 (1854).

c. The Shellfish Proviso Viewed in Light of Post-treaty Conduct by Both Parties

The parties' post-treaty conduct is particularly instructive as to the meaning ascribed to the Shellfish Proviso by the parties themselves. A party's conduct manifests its interpretation of particular language and is, therefore, evidence of their intentions.

i. Conduct of the United States

The State of Washington and the intervenors point to four aspects of the United States' conduct which, they argue, support either a literal interpretation of "staked" or an interpretation of "staked" as meaning "claimed as private property." These four aspects involve development by the United States, actions of the territorial legislature, the failure of the United States to object to the land policy of the State of Washington, and a 1905 decision of the Commission of Indian Affairs.

A. Development by the United States

The evidence is undisputed that the United States participated in the building of forts and navigation channels. Indeed, the Tribes' expert admitted that the United States expected that there would be extensive development of the tidelands.

As discussed above, however, it appears that the anticipation of development on the tidelands was a phenomenon entirely unrelated to the crafting of the Shellfish Proviso. The evidence and reasoning supporting that proposition leads to a similar conclusion with respect to the United States' post-treaty conduct: because the United States viewed shellfish resources as exceptionally abundant, and because the United States was aware of thriving shellfishing operations in fully developed cities, it presumably did not view its participation in post-treaty tideland development as a derogation of the Indians' right to take fish. This conduct, then, does not weigh in favor of the defendant's and intervenor's proposed interpretation.

B. Actions of the Territorial Legislature

The State of Washington and the intervenors also point to the actions of the United States Territorial Government in the

period between the signing of the Treaties and Washington's admission to the Union. The evidence indicates that the United States territorial legislature granted a parcel of tideland in the Totten Inlet to private owners in 1864. Furthermore, it was the territorial legislature, not the State of Washington, that first allowed citizens the exclusive use of natural oyster beds in 1879.[21]

Evidence of the actions of the territorial legislature does tend to support the interpretations of "staked" and "cultivated" offered by the defendants and the intervenors. The Court considers it significant, however, that neither of these dispositions occurred until *ten years after the signing of the Treaties*; furthermore, the 1879 Act, which represents the first substantial step in privatizing the tidelands, *did not occur until 25 years after the Treaties had been signed.* Accordingly, the weight of this evidence in support of the defendant's and the intervenors' interpretation is reduced by the passage of time between the signing of the Treaties and these actions of the territorial legislature.

C. *The Failure of the United States to Object to the Land Policy of the State of Washington*

The third aspect of the United States' post-treaty conduct cited by the State and the intervenors is the United States' silence while Washington executed its policy of alienating tideland parcels to private owners. Washington became a state in 1889, and in 1895 it passed legislation (the "Bush" and "Callow" Acts) for the private purchase of tidelands, even when those tidelands contained natural shellfish beds. There is no evidence that the United States intervened on behalf of the Indians, by threat of litigation or otherwise, when the legislation was passed in 1895.

This evidence, like the acts of the territorial legislature, tends to support the interpretation offered by the State and the intervenors. Again, however, the probativeness of this evidence is considerably weakened by its remoteness in time from the execution of the Treaties. The passage of the Bush and Callow

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21 *See* An Act to Amend an Act Entitled "An Act to Encourage the Cultivation of Oysters," (Approved November 14, 1879), Laws of the Washington Territory, enacted by the Legislative Assembly in the Year 1879 (Olympia: C.B. Bagley, Public Printer, 1879) at 118-20; White, PL-160 at Ch. II, 52] [*sic*]

Acts, and the United States' subsequent inaction, did not occur until forty years after the Stevens Treaties were signed. It should further be noted that neither the Territory nor the State of Washington could terminate pre-existing federal treaty rights by simply selling the land in which those rights existed.

D. 1905 Decision by the Commissioner of Indian Affairs

Finally, Defendant and the intervenors argue that a 1905 letter-opinion by the Commissioner of Indians Affairs reflects a broad interpretation of the Shellfish Proviso by the United States. In 1905, Harry Liston, the Superintendent of the Puyallup Indian Agency, wrote a letter to the Commissioner of Indian Affairs relaying a complaint from the S'Klallam Indians seeking advice.[22] The S'Klallams complained of their recent exclusion from their usual and accustomed clam digging areas by three men claiming to have leases to the tidelands. [23] In response, the Commissioner responded that

> it is the opinion of this office that such lands are under the control and jurisdiction of the State; that the Indians should not be permitted to trespass upon the tide lands leased from the State; that in case they desire special privileges as to the digging of clams from the tidelands referred to, it will be necessary for them to lease the same from the State of Washington. . . . However, *if there are tide lands used in common* by the citizens of that region, the Indians, under said article IV, have the right to take fish, clams, etc. from such lands.[24]

This correspondence has no relevance to the appropriate interpretation of the Shellfish Proviso. It is absolutely clear from the underlined portion of the commissioner's letter that he based his opinion on the belief that the Indians' treaty could only be exercised on "in common" lands; his letter makes no mention of the Shellfish Proviso as a basis upon which Indians could be excluded from the leased tidelands. Moreover, this opinion was voiced nearly a half century after the Stevens Treaties were signed.

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[22] *See* Letter dated February 14, 1950, D-122.

[23] *See id.*

[24] Letter dated March 20, 1950, D-123 (emphasis added).

In sum, the United States' relevant post-treaty conduct does not strongly support the interpretation advanced by the State of Washington and the intervenors. Granted, the cited conduct points to gradual erosion of the Indians' fishing rights; however, the fact that these rights became decimated over time does not imply that did not exist in the first instance.

ii. Conduct of the Signatory Tribes

The State and the intervenors also rely on the Indian response to the Bush and Callow acts to support their interpretation. The evidence indicates that some individual members of the plaintiff Tribes purchased tidelands under the Bush and Callow Acts. Furthermore, the record contains only one instance of Indian protest regarding the alienation of tidelands by the Territorial Government and the State of Washington. That one example, cited by Plaintiff's expert, Dr. White, is the complaint of the S'Klallam tribe that precipitated the 1905 letter opinion by the Commissioner of Indian Affairs.

The purchase of tideland by individual Indians, however, has little if any probative value, as to the meaning of the Shellfish Proviso. No evidence exists that these individuals' actions were taken pursuant to their understanding of the Shellfish Proviso; rather, the evidence indicates that these individuals were simply responding to a massive land rush and taking all possible steps to safeguard their access to fish and their personal self-interests.

Thus, the proffered evidence of the Tribes' post-treaty conduct does not weigh heavily in favor of the defendant's and intervenors' proposed interpretations.

d. Conclusion

The Court interprets the terms "staked" and "cultivated" as the terms were defined and used in the shellfishing industry at and before treaty time. At treaty time, the term "cultivate" was defined in the shellfish context by Ingersoll as an activity occurring only on artificial beds. In addition, consistent with the virtually uniform body of state statutes and common law, the activities of "staking" and "cultivating" occurred only on artificial beds. When the parties used these terms in the Shellfish Proviso, they intended only to exclude Indians from artificial, or planted, shellfish beds; they neither contemplated nor desired that the Indians would be excluded from natural shellfish beds.

Therefore, the words "any beds staked or cultivated by citizens," describe artificial shellfish beds created by private citizens. Moreover, at treaty time, artificial beds contained shellfish deposited for either growing or storage purposes, and were surrounded by stakes or other markers to the extent that they did not interfere with navigation. Thus, clearly, as has been explained, the intervenor growers' farms, which are artificial beds as herein described, are "staked or cultivated," as that clause has been interpreted by the Court. Such beds are not subject to fishing by the Tribes, except to the extent that natural clam beds may be subjacent to the staked or cultivated shellfish beds, as explained below. Finally, it is also clear that the intervenor private property owners' natural beds are *not* "staked or cultivated;" thus natural beds, if any, located on privately owned tidelands, are part of the tribal fishery.

In the preceding sections, the Court evaluated the evidence in accordance with the principles of treaty interpretation established by the Supreme Court. The analysis in those preceding sections overwhelmingly supports the Tribes' proposed interpretation of the Shellfish Proviso. First, and most importantly, in interpreting the Shellfish Proviso, the Court must focus on what the Indians intended: the record unequivocally reflects the Indians insistence on reserving the right to fish as they always had, and the record is devoid of any objections or concern over their exclusion from ancient shellfish fisheries.

Second, the focus must be on what the Indians understood. Indeed, because only artificially planted beds were "staked" or "cultivated" at Shoalwater Bay, it is unlikely that the Indians would have understood these words to exclude them from natural shellfish beds.

Finally, the focus is on what the United States intended and understood: the interpretation offered by the Tribes is consistent with both the United States' short-term goals and its long-term visions for the Washington Territory.

5. *Right of Tribes to Take Naturally-Occurring Clams from Underneath Staked or Cultivated Oyster Beds*

The Tribes argue that they also have the right to take 50% of the harvestable naturally occurring clams from the beds that exist underneath many artificial oyster beds. The intervenors, on the other hand, argue that these clam beds fall directly within the ambit of the Shellfish Proviso because the clam beds are

"shellfish," and the natural clams will be harvested from beds that are "staked or cultivated," even when using the Tribes' interpretation of the Shellfish Proviso.

Consistent with its interpretation of the other provisions of the Treaties, the Court relies on, inter alia, the historical context of the treaty, the principal that ambiguities must be resolved in the favor of the Indians, and the "reservation of rights" doctrine in order to decide whether clams from natural beds beneath artificial oyster beds may be harvested.

The Court finds that plaintiffs' evidence is more persuasive and demonstrates that, at treaty time, the exclusive rights gained by one who had staked or cultivated an (artificial) oyster bed did not extend to the natural clam beds found beneath. It apparently was a common practice for Indians and other citizens to harvest claims legally[25] from natural clam beds existing beneath artificial shellfish beds; thus it is likely that the Indians understood that this practice would continue, notwithstanding the existence of the Stevens Treaties.

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25 At or around treaty time, many state legislatures had passed laws that proscribed penalties for those entering upon artificial oyster beds and taking oysters; however, these states did not extend the penalty to clams. *See* An Act concerning Oyster, April 28, 1851 (Ca.); Act of 1847 ch. 86 14 (Va.). In fact, many state laws often protected the right of a citizen to take clams from beneath an artificial oyster bed. *See* Act of May 1844, § 4 (R.I.); An Act Regulating and Protecting the Planting of Oysters, June 23, 1855, § 10 (Conn.). Furthermore, the case law also supports this conclusion. *See Phipps v Maryland*, 22 Md. 380 (1864) (statutes regulating the planting of oysters did not diminish public's fishing rights); *Brown v DeGroff*, 14 A. 219 (N.J. 1888) (oyster cultivator may not bring suit against "clammers" who entered his oyster bed to collect subjacent clams); *State v. Taylor*, 27 N.J.L. 117 (N.J. 1858) (planted oysters may not interfere with public's fishing rights); *Fleet v Hegeman*, 14 Wend. 42 (N.Y. App. Div. 1835)(artificial oyster beds could be created and protected only if their creation did not interfere with the public's right to fish). The laws cited by the defendants as evidence that some states punished clammers for taking subjacent clams are not persuasive nor are they directly on point, as these laws punished trespass. Because taking subjacent clams from artificial oyster beds was considered to be a public right, such action was not an unlawful interference with another's person, property, or rights; hence the action was not a trespass. *See* An Act in Addition in Addition to an Act Entitled 'An Act for the Growing of Oysters,' June 13, 1845 (Conn.); An Act to Encourage and Protect the Planting of Oysters, August 15, 1849 (Me.); An Act to Encourage and Regulate the Planting of Oysters in the Township of Perth Amboy, Nov. 25, 1824, § 1 (N.J.).

III. THE "*SHIVELY* PRESUMPTION" AND THE EQUAL FOOTING DOCTRINE

The State of Washington and the intervenors urge the Court to construe the Stevens Treaties in light of the "Equal Footing Doctrine" and the "*Shively* presumption." Under the Equal Footing Doctrine, every new state is entitled to entrance into the Union free of any encumbrance on its land, so that it stands on "equal footing" with the other states. *Shively v. Bowlby*, 152 U.S. 1 (1894). The "*Shively* presumption" is an outgrowth of this doctrine, and holds that any pre-statehood grant of property does not include tidelands unless the grant clearly indicated that tidelands were included. *See United States v. Holt State Bank*, 270 U.S. 49 (1925).

In sum, their argument under the Equal Footing Doctrine is that any treaty right to harvest shellfish would amount to a property interest in the tidelands and since the treaty does not clearly specify an intent to grant a property interest in the tidelands, under the *Shively* presumption, the treaty cannot be construed as providing a right to harvest shellfish, or, alternatively, that the Shellfish Proviso must be broadly construed. For the reasons set out below, the Court rejects this argument and interprets the Stevens Treaties without regard to the Equal Footing Doctrine or the *Shively* presumption.

First, the Equal Footing Doctrine cannot be applied to rights reserved by the Tribes. It is clear that in *Holt State Bank* and *Montana v. United States*, 450 U.S. 544 (1981), the Supreme Court viewed the disputed fee title rights to lands underlying navigable waters as reserved by the United States before the subject treaty was made. Both cases frame the issue in terms of whether the United States "conveyed" or "disposed of" its fee title rights. *See Holt State Bank*, 270 U.S. 49, 57 (1925); *Montana v. United States*, 450 U.S. 544, 550-51 (1981). In *Holt State Bank*, the Court found "there was nothing in [the Treaties] which even approaches a grant of rights in lands underlying navigable waters." *Holt State Bank*, 270 U.S. at 58. In *Montana*, the Court held that the treaty "did not by its terms formally convey any land to the Indians at all." *Montana* ,450 U.S. at 553. Implicit in these conclusions is a finding that, prior to the respective Treaties, the United States held fee title to the beds of Mud Lake and the Big Horn River.

The reasoning in *Holt State Bank* and *Montana* is consistent with the concept of "aboriginal title" or "Indian title," first articulated by Chief Justice John Marshall in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). In *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974), the Supreme Court explained "aboriginal title:"

> It very early became accepted doctrine in this Court that although *fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign* -- first the discovering European nation and later the original States and the United States -- a right of occupancy in the Indian tribes was nevertheless recognized.

Id. at 667. *See also Lac Courte Oreilles Band, Etc. v. Voigt*, 700 F.2d 341, 351 (7th Cir. 1983) (distinguishing between "treaty-recognized title," and right of permanent occupation, and "aboriginal title," which could be extinguished at any time by the United States). Thus, the Court in *Holt State Bank* and *Montana* properly viewed permanent fee title to the river and lake beds as held by the United States.

The paradigms of *Holt State Bank* and *Montana*, however, simply are not present in the case before this Court--the analysis in those cases, and their reliance on the *Shively* presumption, is inapplicable because, here, the Indians possess the disputed rights pre-treaty, and the treaty simply effects a reservation of rights. It is settled under *Washington II* that the fishing rights at issue in this case predated the Stevens Treaties, and the Treaties simply effected a reservation of those rights. See *Washington II*, 520 F.2 at 684. Similarly, the Supreme Court acknowledged the reservation in *Fishing Vessel*: "The fishing clause speaks of 'securing' certain fishing rights, a term the Court has previously exercised." *Fishing Vessel*, 443 U.S. at 678. Because the Stevens Treaties must be construed as a reservation of rights by the Tribes, not a granting of rights by the United States, the *Shively* presumption and the Equal Footing Doctrine cannot play a role in the evaluating the existence or scope of the rights.

In addition, the Supreme Court has applied the Equal Footing Doctrine in one context only, namely when evaluating a claim of right to lands beneath navigable waters based upon an alleged conveyance or retention of fee simple ownership by the

United States prior to statehood. *See Shively*, 152 U.S. at 2 (defendants were successors to "owners of a donation land claim, as laid out and recorded by [the predecessor in interest] under the act of congress . . . . commonly known as the 'Oregon Donation Act," embracing the then town and much of the present city of Astoria"); *Montana*, 450 U.. at 550-51 ("The question is whether the United States conveyed beneficial ownership of the riverbed to the Crow Tribe by the Treaties of 1851 or 1868"); *Holt State Bank*, 270 U.S. at 57 (adjudicating the question of "whether the lands under the lake were disposed of by the United States before Minnesota became a state"); *Utah Division of State Lands v. United States*, 482 U.S. 193, 204 (1987) (The United States answered in the District Court that title to the lakebed remained in federal ownership by selection of the lake as a reservoir site prior to Utah's statehood). The court has never applied the doctrine in the context of a claim of right based on an alleged pre-statehood reservation of fishing rights, and lower courts have followed the pattern of the Supreme Court.[26]

The case before this Court is a dispute that does not in any way involve ownership of tidelands. The Tribes do not claim ownership of tidelands today, nor is the Tribes' based upon an alleged pre-statehood conveyance of ownership of the tidelands. At stake in this case are shellfishing rights, and there is no Supreme Court or other authority that would justify application of the Equal Footing Doctrine in this context.

Finally, the Equal Footing Doctrine cannot form the Court's interpretation of the Treaties' language concerning the right to fish in general. The "right of taking fish" has been interpreted both Winans[27] and *Fishing Vessel* without incorporation of the Shively presumption. While it is true that Winans discusses the Equal Footing Doctrine, it does not discuss Shively in the context of interpreting the treaty. Rather, the discussion of the Equal Footing Doctrine in Winans is distinct from its interpretation of the treaty, and can be regarded as dicta addressing the "subsidiary contentions" of the defendants in that

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[26] All of the Ninth Circuit cases discussing the Equal Footing Doctrine involve claims to ownership of submerged lands. *See e.g., United States v. Pend Oreille Public Utility Dist No. 1*, 926 F.2d 1502, 1509 (9th Cir. 1991); United States v. Aam, 887 F.2d 190, 191 (9th Cir. 1989); *Puyallup Indian Tribe v Port of Tacoma*, 717 F.2d 1251, 1257 (9th Cir. 1983).

[27] *United States v. Winans*, 198 U.S. 371 (1905)(a treaty is a grant of rights from the Indians, not to the Indians).

case. Moreover, in *Fishing Vessel*, the Court makes no reference at all to the Equal Footing Doctrine.[28]

The State of Washington and the intervenors have not explained why this Court, unlike its predecessors, should, for the first time, incorporate the *Shively* presumption into its analysis of the Shellfish Proviso. This case is not the first, as the State of Washington and the intervenors argue, to implicate property rights. The Court in *Winans* upheld the Indians' right to cross private property to take fish. *Winans*, 198 U.S. at 381 ("[T]he Indians were given a right in the land--the right of crossing it to the river--the right to occupy it to the extent and for the purpose mentioned."). Furthermore, the right to take salmon and steelhead, upheld in *Washington II* and *Fishing Vessel*, includes the right to use private tidelands for beach seines, tidal impoundment traps, stake nets and reef nets. Nevertheless, the Equal Footing Doctrine was rejected by this Court in *Washington I* and ignored by the Supreme Court in *Fishing Vessel*. There is no reason why this Court should now take a different tack in interpreting the fishing clause.

In sum, the Court interprets the words of the Stevens Treaties in light of the specific principles of construction applicable to Indian Treaties and concludes that fishing rights are rights reserved by the Tribes and not granted to them. The Court construes both the Fishing Clause, in general, and the Shellfish Proviso, in particular, without regard to the Shively presumption.

IV. MODERATE LIVING DOCTRINE

Assuming that the Tribes' interpretation must prevail, the defendant and the intervenors argue that, in order to maintain a "moderate living," the Tribes do not need to exercise any treaty entitlement to the shellfish. The Tribes, however, argue that the evidence does not support any reduction in their tribal share.

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28 The decision below decisively rejected the *Shively* presumption as a relevant consideration:

> [a]dmission of the State of Washington into the Union upon an equal footing with the original states had no effect upon the treaty rights of the Plaintiff tribes. Such admission imposed upon the State, equally with other states, the obligation to observe and carry out the provisions of treaties of the United States.

U.S v Washington, 384 F.Supp. at 401.

A. Fishing Vessel and the Moderate Living Doctrine

The right to take fish "in common with" other citizens entitles the Tribes not only to equal access to the fish, but also to an allocation, or "fair share," of the harvestable fish runs.[29] The Supreme Court devised a formula by which a "fair share" of the available fish may be calculated, generally providing that the harvestable fish passing through the usual and accustomed places will first be equally divided.[30] Under the Moderate Living Doctrine, this equal amount, however, may be reduced if tribal needs could be satisfied by a lesser amount. The Supreme Court found that the 50% amount could be reduced if substantial changes in circumstances had occurred, such as if the Tribe has dwindled to only a few members, or if the Tribe had voluntarily abandoned its fisheries. *Fishing Vessel*, 443 U.S. at 685-87. Thus, in *Fishing Vessel*, the Supreme Court found that the 50% amount is the maximum, but not the minimum, that the Indians are to be allocated, namely the Tribes are to be allocated only that portion which will provide them a "moderate living." 443 U.S. at 685-86.

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[29] See *Washington I*, 384 F.Supp. at 343. "Harvestable fish are those which remain to be taken after deducting the number of fish required for conservation purposes.

[30] A presumptive 50-50 allocation arises from the analogy of "in common with" fishing rights to a quasi-cotenancy:

> The logic of the 50% ceiling is manifest. For an equal division--especially between parties who presumptively treated with each other as equals--is suggested, if not necessarily dictated, by the word "common" as it appears in the treaties. Since the days of Solomon, such a division has been accepted as a fair apportionment of a common asset, and Anglo-American common law has presumed that division when, as
> here, no other percentage is suggested by the language of the agreement or the surrounding circumstances.

443 U.S. at 686 n.27.

Ultimately, the Supreme Court grounded its 50% presumptive share on the Indians' likely understanding of the words "right of taking fish," contemporaneous treaty usages of the word "common," and interpretation of contemporaneous treaties with Britain, in which similar language was interpreted to give each signatory nation an "equal" and apportionable "share" of the share of the fish harvest from the treaty area. 443 U.S. at 677-78.

B. The Moderate Living Doctrine in this case

The Court finds that no persuasive evidence has been presented to the Court by the State and the intervenors showing that a substantial change in circumstances has occurred,[31] so that the Tribes could maintain a moderate living without the exercise of their fishing rights, or that the Tribes have voluntarily abandoned their fisheries. Therefore, the Court declines to apply the Moderate Living Doctrine to these facts.

The State of Washington and the intervenors' argued at trial that the Court should engage in an economic discussion about the income levels of the tribal members in order to prove that the circumstances of the Tribes have changed to such a degree so as to warrant a reduction in the Tribes' share of shellfish.

The State's and intervenors' expert, Dr. Thomas, however, admitted that "moderate living" is *not* a term of art used by economists. The defendants and intervenors, through the income driven analysis of their expert, seek to prove that the Tribes already derive income from a variety of sources; thus the Tribes do not require a 50% share of the shellfish in order to maintain their "moderate living." Dr. Thomas relied solely on what he called "tribal household income"[32] and compared it to a moderate living standard by reference to the Bureau of the Census income data for non-Indian households.

Dr. Thomas' argument is flawed because it relied only on income, namely it was a single-indicator analysis. A more appropriate analysis, such s the analysis of the Tribes' expert Dr. Meyer, focuses on a several relevant factors in order to determine if the circumstances of the Tribes have changed to such a degree so that a reduction in the tribal share of shellfish is warranted. The uncontroverted evidence presented at trial is that the Tribes lag significantly behind other residents of the State of *Washington I*n their overall standard of living. For example, approximately one

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31 In fact, in the Pre-Trial Order, admitted fact #1, of all parties, is that "no plaintiff tribe has dwindled to just a few members."

32 This amount was calculated by including household incomefrom Census data for all Indians, Eskimos, and Aleuts residing on the reservations o the plaintiff Tribes. Dr. Thomas then used Census income data for Indian households and added what he called "tribal collective income" to the tribal household income. He than compared his calculation of average tribal household income to his definition of moderate living.

in three Tribal members live below the poverty level; Indians in the State of Washington endure health circumstances characterized by the State as "very poor;" tribal members have per capita incomes that are less than one-half the per capita income of non-tribal residents of the State; and tribal members suffer from unemployment rates at least three times greater than that of all non-tribal residents of the State of Washington.

Therefore, the Court declines to apply the Moderate Living Doctrine to reduce the Tribes' share of harvestable fish on the basis that they already derive a sufficient income and standard of living from other sources.

V. AFFIRMATIVE DEFENSES

A. Time-Related Defenses: Laches, Waiver, Estoppel and Adverse Possession

As a last line of defense, the defendant and intervenors suggest that the Tribes have, in various ways, forfeited their shellfishing rights. It is clear, however, that the intervenors have no basis for asserting time-related defenses in this action. The Supreme Court and the Ninth Circuit have consistently held that time-related defenses such as latches, waiver, estoppel, and adverse possession are not available to defeat Indian treaty rights. *See Board of Comm'rs v. United States*, 308 U.S. 343, 350-51 (1939) ("[S]tate notions of latches and statutes of limitations have no applicability to suits by the Government, whether on behalf of Indians or otherwise." (citations omitted)); *Swim v. Bergland*, 696 F.2d 712, 718 (9th Cir. 1983) (defenses not available "even where the Indians have long acquiesced in use by others of affected lands or have purported to grant away their occupancy and use rights without federal authorization."); *Catawba Indian Tribe of South Carolina v. State of South Carolina*, 865 F.2d 1444 (9th Cir. 1989) ("Except where Congress provides otherwise, claims based on Indian title are not subject to state law defenses such as statutes of limitations, adverse possession or laches.")

Accordingly, this Court summarily adjudicated the non-viability of these defenses.

B. Extinguishment by Indian Claims Commission Payments

Intervenor UPOW argues that the claims of many of the plaintiff Tribes to fishing rights under the Stevens Treaties have

been extinguished by prior payments made to those Tribes pursuant to the Indian Claims Commission Act, 25 U.S.C. § 70 ("ICCA"). This argument has no merit.

It is true that the primary purpose of the ICCA was "'to dispose of the Indian claims problem with finality.'" *United States v. Pend Oreille Public Utility District No. 1*, 926 F.2d 1502, 1509 (9th Cir. 1991) (quoting *United States v. Dann*, 470 U.S. 39, 45 (1985)). However, the Indians have never had a claim against the United States for lost fishing rights, because the Indians expressly reserved their fishing rights in the Stevens Treaties. Instead, the claims resolved by the ICC were claims for compensation based on the unconscionable sum provided in the Treaties in exchange for the Indians cession of their lands.

UPOW's citation to *Western Shoshone National Council v. Molini*, 951 F.2d 200 (9th Cir. 1991) is inapposite. In *Molini*, the Claims Commission paid the Western Shoshone Tribe $26 million for "full title extinguishment." The Ninth Circuit found held the "full title extinguishment" was an "unqualified transfer of title" that "include[d] a transfer of hunting and fishing rights." *Id.* at 203. In this case, the Tribes expressly reserved their fishing rights in the Treaties. The taking away of fishing rights occurred not pursuant to the Treaties, but in derogation of the Treaties. The payments awarded by the Commission to the Tribes were in compensation for the cession of the residual portions of their aboriginal title under the Stevens Treaties. The Commission had no obligation to compensate for lost fishing rights, because the Stevens Treaties did not divest the Tribes of fishing rights.

VI. YAKAMA TREATY

The treaty with the Yakamas[33] contains no language similar to the shellfish proviso which is part of the other Stevens Treaties. If the Court were to interpret the Yakama treaty in a vacuum, it would be difficult to determine whether the treaty "right to take fish" encompassed shellfish. The existence of the Shellfish Proviso in the other Stevens Treaties leaves no doubt that fish encompasses shellfish in *those* Treaties. However, an equally compelling rationale, which applies to the Yakama treaty as well as the other Stevens Treaties, is that the "right of taking fish" is a reservation of pre-existing fishing rights, and those pre-existing rights include the right to take shellfish.

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[33] June 9, 1855 (12 Stat. 951).

The Yakama Treaty, however, cannot be construed in a vacuum; it must be analyzed in light of the other Stevens Treaties. The Court recognizes that the Yakamas, like the other Tribes, enjoy the benefit of the canons of construction favoring Indians and would not infer a limitation on the "right of taking fish" without compelling evidence. The timing of the Yakama treaty, the absence of a Shellfish Proviso, and the scant evidence of any shellfishing activity of the Yakama tribe at or before treaty time is compelling evidence that the Yakama's "right of taking fish" does not include shellfish.

First, based on the timing of the treaty and the absence of the Shellfish Proviso, it is clear that the United States did not intend that the Yakamas would reserve shellfishing rights. The treaty with the Yakamas was concluded after the other Stevens Treaties, and it is reasonably clear that the United States, had it contemplated Yakama shellfishing, would have wanted similarly to protect "staked or cultivated beds" from fishing by the Yakamas. Because the United States did not include a Shellfish Proviso, it is reasonable to conclude that the United States did not contemplate that the Yakamas were reserving the right to harvest shellfish.

Moreover, the evidence introduced at trial indicates that it is unlikely that the Yakamas, when they entered the treaty, expected that they were reserving the right to harvest shellfish. The Yakama tribe lived, not in the Puget Sound region, but rather in the eastern Washington plateau. When asked whether she had an opinion as to what were the Yakamas' usual and accustomed grounds and station in Western Washington, the Yakamas expert answered "No, I do not." The evidence indicates that any use individual Yakamas made of shellfish in Western Washington prior to the Treaties was based upon marriage into Puget Sound Tribes.

Therefore, the court finds that the Yakama Tribe did not reserve a right to harvest shellfish when it entered into the treaty with the United States.

VII. SUCCESSORSHIP OF THE UPPER SKAGIT TRIBE TO THE NUWHA'HA AND THE BSIGWIGWILTS

The Upper Skagit Tribe argues that, since it is the successor of the treaty bands of the Nuwha'ha and the Bsigwigwilts, it is also the successor of the rights held by the Nuwha'ha and the Bsigwigwilts with respect to the right to take

shellfish. The State of Washington alone contests the political successorship of the Upper Skagit Tribe to the Nuwha'ha and the Bsigwigwilts.

Whether or not a particular group of persons has descended from a treaty signatory and has maintained an organized tribal structure is a question of fact which a district court is competent to determine. *Washington II*, 520 F.2d at 693. Furthermore, once a group is found to be the successor in interest to a treaty signatory, that group's rights under the treaty may be "lost only by unequivocal action of Congress." *Id., quoting Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968).

A. Successorship of the Upper Skagit Tribe

1. Successors to the Bsigwigwilts.

The Court finds that the Bsigwigwilts Tribe was previously adjudicated as the predecessor of the Upper Skagit. Thus, the Upper Skagit have the right to take fish from the usual and accustomed places of the Bsigwigwilts.

Washington I referenced and incorporated the Indian Claims Commission proceeding which had been brought by the Upper Skagit to adjudicate the issue of their predecessors-in-interest. *See Washington I*, 384 F.Supp. at 379; 8 Ind. Cls. Comm'n 475, 476-77 (Ddt. No. 92, March 25, 1960). In that proceeding, the ICC found that ten groups, including the Bsigwigwilts, were the predecessors of the Upper Skagit. Although the spelling of the Bsigwigwilts was different in the Indian Claims Commission proceeding; this Court is satisfied with the uncontroverted expert testimony presented at trial which accounted for the variations in the modern spelling.[34]

2. Successors to the Nuwha'ha

The issue of the successorship of the Upper Skagit to the Nuwha'ha is somewhat more involved because the Nuwha'ha were not identified by the Indian Claims Commission proceeding and subsequently incorporated into *Washington I* as one of the predecessor groups of the Upper Skagit.

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[34] In the Indian Claims Commission proceeding, the Bsigwigwilts Tribe was referred to as the "Mee-see-qua-quilch."

As a preliminary matter, it is clear that the tribe or group asserting the successorship bears the burden of proof on this issue. *Lummi Indian Tribe*, 841 F.2d 317, 318 (9th Cir. 1988). Moreover, to acquire the rights of a treaty signatory tribe, a contemporary tribe must obtain "treaty tribe status." *United States v. Washington*, 641 F.2d 1368, 1370-71 (9th Cir. 1981). For the Upper Skagit to obtain such status, it must demonstrate that a percentage of its members have descended from a treaty signatory and that the Tribe has maintained an organized tribal structure, including some defining characteristic of the original tribe. *Id.* at 1372-73.

a. The Suquamish Test

The State of Washington argues that the Court should not apply the *United States v. Washington* test described above, but instead should apply the test set forth in *United States v. Suquamish Indian Tribe*, 901 F.2d 772 (9th Cir. 1990). In *Suquamish*, the Ninth Circuit held that for one signatory tribe to claim the rights of a second signatory tribe, the plaintiff must show both a consolidation or merger of the tribes and a demonstration that the tribes, together, maintained an organized tribal structure. *Id.* at 776.

The facts in this case, however, are clearly distinguishable from the *Suquamish* case. Specifically, the following differences exist: (1) at issue in *Suquamish* was the consolidation of two signatory tribes; here, no one has presented evidence that the Upper Skagit itself was a treaty signatory; (2) in *Suquamish*, the tribes were mobil, hence providing little interaction that would point to a merger; here the Nuwha'ha and other predecessor bands lived before, during, and after treaty time in the same and adjoining watersheds; and (3) in *Suquamish*, the tribes were hostile to each other; they had no interest in uniting and the United States continued to deal with each group as a separate tribe; here, the Nuwha'ha and the other bands were political allies and shared resources. Consequently, based on these differences, the Court finds the *Suquamish* test inapplicable to this action.

b. The Washington Test

Having found the Suquamish analysis to be inapplicable to these facts, the Court finds the Ninth Circuit's analysis in *United States v. Washington*, 641 F.2d 1368 (9th Cir. 1981), to be

the appropriate test. In that light, the evidence in this case clearly indicates that the Upper Skagit obtained treaty time status, in that it has demonstrated that the requisite percentage of its members have descended from a treaty signatory and that the it has maintained an organized tribal structure, which includes some defining characteristics of the original tribe.

Through the testimony in open Court as well as the reports submitted into evidence, the Upper Skagit demonstrated the necessary facts under the *Washington* test. First, the Upper Skagit have maintained an organized tribal structure: The Upper Skagit claim a membership of approximately 600 members, and they have a tribal council that is elected from the enrolled members of the Tribe. Second, a percentage of the members of the Upper Skagit have descended from the Nuwha'ha. Specifically, as many as 200 of the 600 current tribal members trace their direct ancestry back to the Nuwha'ha. In addition, many members of the current tribal leadership trace their heritage directly to the Nuwha'ha leadership. Indeed, four members of the present council can trace their heritage back to two of the Nuwha'ha treaty time leaders; furthermore, the present chairman of the Tribe is a direct descendant of Nuwha'ha members who were alive during treaty time. As a result, the Tribe has demonstrated that it is the successor to the Nuwha'ha, under the test set forth in *United States v. Washington*; thus the Upper Skagit have a viable claim to the treaty fishing rights of the Nuwha'ha, including the shellfishing rights, under the Stevens Treaties.

B. The Usual and Accustomed Areas of the Upper Skagit Tribe

Having concluded that the Upper Skagit has succeeded to the rights of the Nuwha'ha and the Bsigwigwilts, the Court must determine the usual and accustomed areas of these predecessors from which the Upper Skagit may now take fish.

1. Usual and Accustomed Areas of the Bsigwigwilts and Other predecessors previously determined in Washington I.

In *Washington I*, the Court made findings in regard to the usual and accustomed fishing grounds and stations running along the rivers. Thus, the Court need now adjudicate only the usual and accustomed marine areas of the predecessors of the Upper

Skagit, including the Bsigwigwilts, the Nookachamps, and the Sabelxu.[35]

The uncontroverted evidence presented at trial through oral testimony and written reports is that these predecessor groups, at and before treaty time, took fish, including shellfish, from the marine and fresh waters, tidelands, and bedlands adjacent and subjacent thereto of the areas along the Saratoga Passage on the east coast of Whidbey Island from Sneatlum Point in the vicinity of Penn Cove and Harrington's Lagoon to Holmes Harbor, and on Camano Island from Utsaladdy to what is now the vicinity of Camano Island State Park and Elger Bay. In addition, these predecessor groups of the Upper Skagit also fished at the following marine and tideland locations: Deception Pass, Similk Bay, and southward to and including Penn Cove and Utsaladdy. Because the Upper Skagit have succeeded to the interests of these predecessor groups, the Upper Skagit also have the right to take fish from these usual and accustomed grounds and stations.

2. Usual and Accustomed Ares of the Nuwha'ha

The uncontroverted testimony also indicated that the Nuwha'ha, at and before treaty time, took fish, including shellfish, from the marine and fresh waters, tidelands, and bedlands adjacent and subjacent thereto of the vicinity of Bayview on Padilla Bay to the vicinity of Blanchard on Samish Bay up to and including Chuckanut Bay. Thus, because the Upper Skagit have succeeded to the interests of the Nuwha'ha, the Upper Skagit also have the right to fish, including shellfish, from these usual and accustomed grounds and stations.

VIII. ORDER REGARDING IMPLEMENTATION

This opinion interprets the plaintiff Tribes' right to take shellfish under the Stevens Treaties in light of the Shellfish Proviso limiting such right to the taking of shellfish from beds not "staked or cultivated."

Because of the complex issues and competing concerns involved in the implementation of this decision, and because the

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[35] The Upper Skagit Tribe was determined to have succeeded to the interests of the Bsigwigwilts, as discussed in this opinion. The other Tribes, the Nookachamps and the Sabelxu, were determined to be the predecessors of the Upper Skagit in *Washington I*. That the Upper Skagit succeeds to the interests and rights of the Nookachamps and the Sabelxu has not been contested here.

Court desires to have the benefit of the parties' prior experience in *Washington I*, the Court defers the issue of injunctive relief or any plan of implementation until there has been input from the parties.

Accordingly, the Court orders the parties to submit a jointly agreed upon plan of implementation on or before January 31, 1995. To the extent that the parties cannot agree on any issue, each party shall submit a separate proposal on such issue, supported by factual or legal grounds. All issues should be included and proposals shall be specific. It is the hope of the Court that all issues can be resolved by the parties through good faith negotiations.

IT IS SO ORDERED.

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898 F. Supp. 1453

UNITED STATES of America, et al., Plaintiffs,
v.
STATE OF WASHINGTON, et al., Defendants.

No. CV 9213.

United States District Court,
W.D. Washington.

Aug. 28, 1995

[HEADNOTES OMITTED]

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Allan E. Olson, LaConner, Washington, for plaintiff Swinomish Indian Tribal Community.

Mason D. Morisset, Seattle, Washington, for plaintiff Tulalip Tribe.

Richard Davies, Quileute Natural Resources, LaPush, Washington, for plaintiff Quileute.

Nettie Alvarez, Richard Ralson, Seattle, Washington, for plaintiff Hoh.

Richard Reich, Taholah, Washington, for plaintiff Quinault Indian Nation.

Annette Klapstein, Tacoma, Washington, for plaintiff Puyallup Tribe.

Daniel A. Raas, Bellingham, Washington, for plaintiff Lummi Indian Tribe.

Robert L. Otsea, Auburn, Washington, for plaintiff Muckleshoot Indian Tribe.

John Arum, Richard Berley, Seattle, Washington, for plaintiff Makah Indian Tribe.

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Kathryn Nelson, Eisenhower-Carlson, Tacoma, Washington, for plaintiffs Jamestown, Lower Elwha, Port Gamble Bands of S'Klallams, Skokomish.

Jeffrey Jon Bodé, Bellingham, Washington, for plaintiff Nooksack Tribe.

Bill Tobin, Vashon, Washington, for plaintiff Nisqually Tribe.

Kevin R. Lyon, Olympia, Washington, for plaintiff Squaxin Island Tribe.

Harold Chesnin, Sharon Shaw, Brown-Matthews, Seattle, Washington, for plaintiff Upper Skagit Tribe.

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Eric Richter, Seattle, Washington, Malcolm L. Edwards, Edward-Sieh, Seattle, Washington, for intervening defendants Carter and Adkins, et al.

Albert Gidari, James Rasband, Perkins Coie, Seattle, Washington, for defendant Puget Sound Shellfish Growers.

James J. Johnson, Olympia, Washington, for defendant UPOW.

Daniel W. Wyckoff, Olympia, Washington, for Inner Sound Crab Association.

ORDER RE: IMPLEMENTATION OF SHELLFISH PROVISO

RAFEEDIE, District Judge, Sitting by Assignment.

The Court conducted an evidentiary hearing to assist it in implementing its December 20, 1994, Memorandum Decision

and Order[1] interpreting the Shellfish Proviso of the Stevens Treaties; having read and considered all of the papers filed in this matter and argument of counsel, the Court HEREBY FINDS AND ORDERS as follows:

I. Introduction

The purpose of this Order is to provide a framework for the implementation of the Tribes' fishing rights under the Shellfish Proviso. It is clear that, under the Treaties as interpreted in the Boldt decision,[2] the Tribes have the absolute right to take fifty percent of the shellfish from natural beds in the Tribes' usual and accustomed grounds and stations. Although enforcing this right necessitates changes in the status quo on all the affected property, effectuating the Treaty shellfishing right presents a particularly difficult problem with respect to property owned or leased by commercial Shellfish Growers and Private Property Owners, as compared to that owned by the State of Washington.

The Shellfish Growers and Private Property Owners are, effectively, innocent purchasers who had no notice of the Tribes' Treaty fishing right when they acquired their property. Indeed, many of these Growers and Owners purchased their land at or before the turn of the century, and they reasonably believed the land to be free of encumbrances and servitudes. Their belief was reinforced by the Tribes' failure to formally assert the Treaty right until over 100 years after the Stevens Treaties were signed.[3] Consequently, it is incumbent upon this Court to use its equitable powers to effect a balance between the Tribes' Treaty shellfishing right and the Growers' and Owners' interest in the peaceful enjoyment and/or commercial development of their property.

There is ample authority for this Court to invoke its equitable powers in implementing a plan under which the Tribes may exercise their Treaty right. For example, in *Yankton Sioux*

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[1] *United States v. Washington*, 873 F.Supp. 1422 (W.D. Wash. 1994) [hereinafter *Washington* II].

[2] *United States v. Washington*, 384 F.Supp. 312 (W.D. Wash. 1974) [hereinafter *Washington* I].

[3] The various Stevens Treaties were negotiated in the 1854 and 1855; the original action to enforce the Tribes' Treaty fishing right was commenced in 1970. *See id.* at 353-57.

Tribe of Indians v. United States, although not explicitly acknowledging that it sought an equitable result, the United States Supreme Court approved the payment of money damages to the Yankton Sioux Indians in lieu of restoring a 648-acre tract to the tribe. 272 U.S. 351, 357, 47 S.Ct. 142, 143, 71 L.Ed. 294 (1926). The tract, which the Court held belonged to the Indians in fee, had been "opened to settlement and large portions of [it were then] in the possession of innumerable innocent purchasers." Id. As a result, the Court concluded, it would have been "impossible to . . . restore the Indians to their former rights." *Id.* Clearly, however, it would have been literally possible to eject the settlers, although obviously the Court viewed that option as neither practical nor desirable, under the circumstances. Consequently, it appears that the Court engaged in a sub rosa balancing of hardships. More recently, in *South Carolina v. Catawba Indian Tribe, Inc.*, Justice Blackmun acknowledged that equitable considerations might have limited the remedies available had the plaintiff Tribe prevailed on its claim to 144,000 acres of land. 476 U.S. 498, 519 n.5, 106 S.Ct. 2039, 2050 n.5, 90 L.Ed.2d 490 (1986) (Blackmun, J., dissenting) (citing *Yankton*).[4]

Similarly, the Ninth Circuit has approved weighing equitable considerations in devising a remedy in an action to quiet title to a parcel of land in the daughters of a Nez Perce Indian. *See Brooks v. Nez Perce County, Idaho*, 670 F.2d 835 (9th Cir.1982). Noting that such considerations would not bar the claim to the land entirely, the *Brooks* court nonetheless concluded that "[l]ack of diligence by the government in exercising its role as trustee may be weighed by the district court in calculating damages" for several decades' loss of use of the land. *Id.* at 837.

In *United States v. Imperial Irrigation District*, 799 F.Supp. 1052 (S.D.Cal.1992), Chief Judge Keep relied on *Brooks* to award monetary damages to the plaintiff Indians, rather than restoring tribal land to them. The Indians had a fee interest in land that was flooded, by the United States, for the agricultural development of thousands of acres of land in Riverside and Imperial Counties. Judge Keep utilized equitable factors suggested by the Restatement of Torts to balance the hardships among the parties and concluded that a damage award

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[4] The *Catawba Tribe* Court held that the Tribe's claim was barred by the statute of limitations; hence, the majority did not reach the question of an appropriate remedy. 476 U.S. at 510-11, 106 S.Ct. at 2046.

was more appropriate than injunctive relief because "[a]n injunction would render useless thousands of acres of cultivated farmland to the detriment of innocent farmers who are blameless in this lawsuit and who have worked hard to cultivate desert lands." Id. at 1069.

Further support for the application of equitable principles in drafting an implementation order in this case is found in the Ninth Circuit's opinion affirming the Court's order in connection with the Tribes' anadromous fishing rights: "A cotenant dissatisfied with his partner's exploitation of their common property may seek a partition of the property in order to protect his interest in it. By analogy, the Indians are entitled to an *equitable* apportionment of the opportunity to fish in order to safeguard their federal treaty rights."[5] *United States v. Washington*, 520 F.2d 676, 687 (9th Cir.1975), cert. denied, 423 U.S. 1086, 96 S.Ct. 877, 47 L.Ed.2d 97 (1976) (emphasis added). It is the Court's view, therefore, that in the instant controversy, the Court has not only the authority, but the duty, to fashion an implementation plan in accordance with principles of equity.

II. Equitable Considerations

The Court is persuaded by Judge Keep's analogy to the tort of trespass, in Imperial Irrigation District, supra, and likewise applies in this case the factors suggested by the Restatement of Torts:[6]

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[5] The Supreme Court approved this analogy in *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 690 n.32, 99 S.Ct. 3055, 3076 n.32, 61 L.Ed.2d 823 (1979).

[6] The factors suggested by the Restatement to determine the appropriateness of injunctive relief against trespass are as follows:

(1) The nature of the interest to be protected;

(2) The relative adequacy of injunctive relief and other remedies available to the plaintiff;

(3) Any unreasonable delay of the plaintiff in initiating the action;

(4) Any related misconduct on the part of the plaintiff;

(5) The relative hardship of the parties if the injunction is granted or denied;

(6) The interests of third persons and the public; and

First, the relevant interest to be protected is the Tribes' Treaty shellfishing right, which is similar to a profit a prendre or a license--not a fee interest in land. Hence, the powerful historical legal protection of land ownership is not implicated in this case. Nonetheless, because it derives from the Treaties, the Tribes' right is entitled to significant protection.[7]

Second, although from a purely economic standpoint, monetary relief might be virtually interchangeable with injunctive relief, the evidence clearly indicates that the Tribes' shellfishing rights are not purely economic. Rather, the Tribes have historically fished for religious and ceremonial--as well as subsistence--purposes; thus, their right is not adequately vindicated by monetary relief. Moreover, the Tribes argued persuasively that intangible benefits will inure to their members from exercising the right to fish, such as the cultural value of participating in a traditional activity and the self-esteem of being gainfully employed. These benefits would be lost were the Court to substitute monetary relief for the right to fish.

Third, as previously noted, the Tribes waited over a century to institute formal action to enforce their Treaty right. Of course, the United States, as Trustee for the Tribes, also bears responsibility for the delay; however, as against innocent third parties--particularly the Shellfish Growers and Private Property Owners--the delay weighs against absolute injunctive relief.

As to the fourth factor--related misconduct by the plaintiff--there is no evidence of misconduct on the Tribes' part. Fault for creating this controversy lies squarely with the State of Washington and the United States, for selling the tidelands and not objecting to the sale, respectively.

Factors five and six--the relative hardships of the parties and the interests of the public and third parties--are in this case

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(7) The practicality of framing and enforcing the injunction.

Restatement (Second) of Torts § 936(1)(a)-(g).

[7] Unlike a contractually created license or profit, the Tribes' shellfishing right is the result of the negotiation between two sovereigns, the United States and the Tribes. As such, although Congress retains the power to abrogate the provisions of an Indian treaty, "Indian treaty rights are too fundamental to be easily cast aside." *United States v. Dion*, 476 U.S. 734, 739, 106 S.Ct. 2216, 2220, 90 L.Ed.2d 767 (1986).

somewhat related. As to the Tribes, denying the shellfishing right entirely would be a significant hardship. Allowing unfettered access to the Growers' and Owners' property, however, arguably creates a more significant hardship, given their reasonable expectation of quiet enjoyment and/or commercial development of their land. The hardship is particularly compelling with respect to the Growers, who have invested substantial resources in their commercial operations. The interests of the public are represented by the State of Washington, a party to this action, and the Court acknowledges the general interest of the public in the recreational use of the State's resources, including shellfishing. Moreover, the Court acknowledges that, by including the Shellfish Proviso in the Treaties, the negotiators of the Stevens Treaties sought to protect and aid the development of a shellfish industry, presumably to benefit the public generally. *See, e.g., Washington II*, 873 F.Supp. at 1437-38.

In light of these factors,[8] then, the Court believes that the Tribes' Treaty shellfishing right must be subjected to reasonable time, place and manner restrictions[9] when the right is exercised on the Growers'[10] or Owners' property. In finding that some affirmative right to fish on such private property must be enforced, the Court notes that there are less than 15,000 individual members of the party Tribes. Of these, many do not live on the various reservations and thus are not likely to participate in shellfishing activities. Similarly, in imposing restrictions on the right to fish on commercial and private property, the Court notes that the Growers own or lease only a small fraction of the relevant tidelands (approximately 9500 acres), and that the Tribes likely will not fish on many Owners'

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[8] The seventh factor, related to the practicality of formulating injunctive relief, is not at issue in this case: it clearly is feasible to frame and enforce injunctive relief.

[9] In discussing the modification of an injunction relating to the apportionment of certain Indian tribes' fishing rights in the Columbia River basin, the Ninth Circuit has noted that "[i]t is established that 'the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the state in the interest of conservation....'" *United States v. Oregon*, 657 F.2d 1009, 1016 (9th Cir.1982) (*quoting Puyallup Tribe v Department of Game of Wash.*, 391 U.S. 392, 398, 88 S.Ct. 1725, 1728, 20 L.Ed.2d 689 (1968)).

[10] In addition, as discussed *infra*, Section III.B., because of the difficulties in distinguishing artificial and natural beds on the Growers' property, the Court believes that it is also appropriate to refine the definitions of such beds as they are applicable to shellfish on the Growers' property.

property because it simply is not practical to do so, given the low concentration of shellfish. Thus, this balancing vindicates the Owners' and Growers' reasonable expectations without unnecessarily impinging on the Tribes' right to fish.

III. Additional Definitions

Before setting forth specific implementation procedures, it is necessary to resolve certain issues raised by the parties:

A. Whether artificial beds hereafter created by the State to enhance recreational activities for its citizens should be subject to a Treaty allocation

The Shellfish Proviso in the Stevens Treaties precludes Tribes from harvesting on "any beds staked or cultivated by citizens." The Court finds that the term "citizens," as used in the Treaties, includes the State of Washington, when the State acts on the behalf of the public.[11]

The testimony at the hearing on implementation indicated that when the State creates artificial beds, it does so for the benefit of all its citizens, many of whom visit state parks to participate in recreational shellfishing. Mr. Cleveland Pinnix, Director of Washington State Parks, testified that the attendance at the state parks has been increasing steadily for several years and that one of the reasons for the increase in attendance is the public's desire to engage in shellfishing activities. In addition, Mr. Pinnix testified that the Parks Department hoped to continue planting shellfish because "[w]e have a limited resource at state parks. We have a great deal of public interest. Our hope is to expand the recreation opportunities for other people of the state."

Based on the uncontradicted evidence presented by the State, it is clear that when the State fosters the growth of shellfish on state property, it acts on behalf of its individual

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[11] To the extent that the term "citizens" might be read to include only natural persons, as the Tribes argued, the Court also finds that equitable considerations warrant treating the State as a de facto citizen when it acts on behalf of its citizens. The five million residents of the State are blameless in this controversy, and the Court believes that the benefits and efficiencies of permitting the State to act on their behalf in growing the State's shellfish resource far outweigh any interest the Tribes have in limiting the artificial bed exclusion to natural persons.

citizens.[12] Accordingly, to the extent that the State hereafter creates artificial shellfish beds on public property, those beds shall be deemed "staked or cultivated by citizens" and thus excluded under the Shellfish Proviso from the Tribes' Treaty right. Members of the Tribes, however, shall have the same access to such beds as all other citizens. The Court is not persuaded *that United States v. Washington*, 759 F.2d 1353 (9th Cir.1985), compels a different result.

B. Further Refinement of the Definitions of Natural and Artificial Beds

1. Natural Shellfish Beds

In the Court's Memorandum Decision and Order, the Court held that natural beds could not be staked or cultivated by citizens. *See Washington II*, 873 F.Supp. at 1440. The Court did not, however, determine what minimum quantity of shellfish constitutes a bed--that is, for example, do two clams constitute a natural bed that cannot be staked or cultivated? Subject to the provisions, *infra* section III.B.2., regarding *existing* beds on Growers' property, the Court believes that clarification of the definition of a natural bed is necessary to enable the Tribes and the Growers to implement the Tribes' Treaty right while promoting the growth of the industry generally.

The evidence presented to the Court during both the May 1994 trial and the May 1995 implementation hearing suggests that the Court should further refine the definition of a natural shellfish bed so that it corresponds to the usage at treaty time, namely that a natural bed should be defined quantitatively. The Court, in its Memorandum Decision and Order, discussed at great length the influence of the East Coast shellfish industry on the treaty negotiators, noting that East Coast shellfish practices likely were representative of the common practices of both the industry generally and the West Coast shellfishing industry specifically. *See, e.g., Washington II*, 873 F.Supp. at 1431-34.

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[12] The Court believes that the circumstances presented in this case are analogous to a situation in which, under the doctrine of *parens patriae*, "'a state that is party to a suit involving a matter of sovereign interest is presumed to represent the interests of all its citizens.'" *Alaska Sport Fishing Assn. v. Exxon Corp.*, 34 F.3d 769, 773 (9th Cir.1994) (citation omitted). For a general discussion of the doctrine, *see Hawaii v Standard Oil Co. of Calif.*, 405 U.S. 251, 257-60, 92 S.Ct. 885, 888-90, 31 L.Ed.2d 184 (1972).

Specifically, the 1876 report of Lt. Paul DeBroca,[13] cited in the Court's opinion, defined a "natural bank" as a

> conglomeration of mollusca presenting a character of continuity.... The natural bank may be single or formed of several smaller banks, separated by greater or less spaces, but always sufficiently connected to be considered parts of one whole. *As to places where, through accidental circumstances, isolated oysters have developed, they are not classed among the natural beds, since, if this were the case, the largest part of the submarine soil of the coast would be under interdiction and oyster culture would be impossible.*

Id. at 1432 (citation omitted) (emphasis added). From that definition, it is clear that the industry placed no restrictions on planting or cultivation activities on naturally occurring beds comprised of only isolated oysters because such a restriction would unduly interfere with the industry's growth by precluding cultivation on "the largest part of the submarine soil."

Other evidence offered at the May 1994 trial supports this interpretation of a natural bed. Indeed, the evidence established that the shellfish industry considered a "natural bed" to be one that could support a commercial livelihood. The Court is not persuaded by the Tribes' arguments that a commercial or quantitative definition is inappropriate since they also fish for ceremonial or subsistence purposes. While the Court acknowledges that fact, the reasons that the Tribes fish are not relevant to the industry's definition of a natural bed at treaty time.[14]

Thus, in light of the practices and understandings in the shellfish industry that existed at treaty time, it is clear that a quantitative definition of a natural bed is appropriate. In order to preclude future disputes among the parties, the Court further defines a "natural shellfish bed" as follows: a natural shellfish bed is a bed which is capable of sustaining a yield of shellfish

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[13] Entitled "On the Oyster Industries of the United States." Plaintiff's Exhibit PL-237.

[14] The Court notes that during the May 1994 trial, the Tribes themselves argued that the Court should look to the shellfish practices and industry of the East and West Coasts in shaping its interpretation of the Treaties. The Tribes cannot rely on those practices selectively to advocate their position on some issues while ignoring the practices as to others.

that will support a commercial livelihood. Based on the evidence presented, it is clear that this quantity will vary by species. Evidence offered by the parties indicated that the minimum quantity for manila clams ranged from .5 pounds per square foot to 1.15 pounds (and higher) per square foot, and the Court finds that the minimum quantity that will support a "commercial livelihood" is at least .5 pounds of mature clams per square foot. The relevant quantities for other species shall be determined by the parties' agreement, or though the use of the dispute resolution procedures in the Implementation Plan.

This definition of a natural bed applies *only* in the context of determining what beds may be "staked or cultivated by citizens." It does not purport to limit the Tribes' right to take shellfish from natural beds which do not meet the relevant minimum quantity threshold.[15]

2. *Artificial Shellfish Beds*

The Shellfish Proviso exempts from the Tribes' Treaty right beds which are staked or cultivated. In its December 1994 Memorandum Decision and Order, this Court distinguished such so-called artificial beds from natural beds, from which the Tribes have the right to harvest shellfish, setting forth definitions of both types of beds. Faced with the practical difficulties, discussed below, in categorizing beds on the Growers' property, the Court finds the following refinement of the definition of artificial beds both necessary to effectuate an implementation plan and appropriate in light of equitable considerations *with respect to existing beds on property owned or leased by Growers licensed by the State of Washington.*

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[15] The Treaties reserved the right to take fish, including shellfish, from their usual and accustomed grounds and stations subject to the limitation that "they shall not take shellfish from any beds staked or cultivated by citizens." Treaty of Medicine Creek, December 26, 1854 (10 Stat. 1132); *see Washington II*, 873 F.Supp. at 1422 n. 3.

Accordingly, the right to take shellfish was not limited to natural beds but rather was exclusive of artificial beds. Consequently, the shellfish industry's working definition of a natural bed that could not be staked or cultivated is relevant only in that narrow context; it does not limit to the Tribes' right to take fish from *any* "non-artificial" bed.

The Court notes, however, that throughout this Order and at other times in this case, the Court and the parties have used the term natural beds to describe those non-artificial beds from which the Tribes have the right to take shellfish. Such use of that term does not imply a quantitative limit on the beds from which the Tribes may take shellfish.

The parties all agree that any shellfish beds created exclusively by the Growers' efforts--"by scratch," as it were--are not subject to tribal harvesting, as such beds are clearly "staked or cultivated" within the meaning of the Shellfish Proviso. There is less agreement among the parties, and less clarity under the Proviso, in connection with the remaining beds. At first blush, it might appear that determination of whether a bed is "natural" or "artificial" is an easily soluble--though heavily fact-driven-- inquiry. This, unfortunately, is not the case. The evidence presented suggests that a number of types of shellfish beds exist:[16] (1) those created by scratch (which are clearly artificial);[17] (2) those enhanced by the Growers' positive efforts, such as planting, netting or seeding pre-existing shellfish beds; (3) those enhanced by the Growers' preventative efforts, such as predator control or rototilling in or around pre-existing beds; (4) those beds whose existence is due to the Growers' efforts, albeit passively, such as the "natural" migration of shellfish from an artificial bed to a new spot; and (5) those beds whose existence is entirely due to the natural propagation of the species (clearly natural beds).

As discussed below, the Court finds that, *as to existing shellfish beds on the Growers' property*, only those beds in the fifth category are subject to the Tribes' Treaty right, and that the remaining categories of beds are "staked or cultivated" within the meaning of the Proviso. Specifically, the Court finds that the term "cultivated" encompasses the wide range of techniques used by the Growers to enhance production of shellfish on their property, including, but not limited to, the so-called positive, preventative and passive techniques described above.[18] Further, the Court finds that, even if shellfish begin to set naturally in an artificial or de facto artificial bed, such bed will retain its artificial character and thus remain exempt from tribal harvesting--that is, once a bed is determined to be artificial, it shall remain an artificial bed unless it is abandoned.

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16 The examples cited for each category are not meant to be exclusive; rather, they are illustrative of the Growers' efforts falling within each category.

17 For example, the Tribes conceded that beds where the *substrate* has been created artificially fall within this category, as do beds of shellfish not indigenous to the area (e.g., Pacific oysters outside the Hood Canal).

18 Beds created or enhanced through such techniques will hereinafter be referred to as "de facto artificial beds."

The Court believes that this categorization is appropriate because, based on the evidence adduced at the hearing,[19] it appears that it would be very difficult--if not impossible--to develop a "snapshot" of existing shellfish beds at the time commercial development commenced on the Growers' property. Further complicating the issue is the fact that shellfish beds are not static. Consequently, the Court simply does not, and cannot with any degree of certainty or precision, know what shellfish beds would exist had the Growers never commenced their farming activities, and any attempt to classify presently existing beds without such information would be speculation at best.

Also weighing in favor of a broader definition of "cultivated" with respect to the Growers' property is the fact that the Court does not believe that the Tribes should benefit from the Growers' efforts. Permitting the Tribes to harvest fifty percent of the shellfish from de facto artificial beds would confer a windfall on the Tribes,[20] and would neither protect nor encourage the growth of the shellfish industry.

Notwithstanding this broad definition of "staked or cultivated," however, no bed will be deemed artificial or de facto artificial merely because it lies on the Growers' property. There may be numerous beds on the Growers' property of which the origin is unknown; these may include beds whose existence is entirely due to the natural propagation of the species. Such beds are subject to tribal harvesting under the Treaties.

In sum, existing artificial and de facto artificial beds are excluded from the Tribes' Treaty right. As to beds which may hereafter develop or be created or enhanced, the status of such beds will be determined by reference to the definition of a natural bed, *see supra* section III.B.1., and the implementation procedures governing the creation of new artificial beds.[21]

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[19] Although the parties presented significant evidence on this issue, none of the evidence was particularly helpful to the Court.

[20] The magnitude of the windfall would be reduced as a result of the Tribes' concession that it would be appropriate to require them to pay the Growers fifty percent of the costs of enhancement in return for a fifty percent allocation of the enhanced shellfish take. The Court does not believe, however, that such a solution adequately balances the hardships between the Tribes and the Growers.

[21] Implementation Plan, § 6.3.

IV. The Implementation Plan

In formulating the following implementation procedures, the Court has considered several issues. As previously discussed, the Court has applied equitable principles to balance the hardships among the parties and has further refined definitions of certain words in the Shellfish Proviso in order to resolve certain practical problems involved with implementation. Although the implementation procedures adopted below are at times specific, the overall Plan is essentially general in nature to enable the parties to resolve their disputes without Court intervention. Finally, the Court notes that the rights of the Tribes, as set forth in this Order, are tribal rights, not individual rights; consequently, it is for the Tribes to determine how each tribal allocation shall be distributed.

In order to accomplish the implementation of the Court's Memorandum Decision and Order, the Court ADOPTS the following procedures [the following sections 1 through 9 shall be referred to as the "Implementation Plan" or the "Plan"]:

1. INTRODUCTION

1.1 Objectives of Plan.

The primary objective of this Implementation Plan is to provide a framework, principles, and course of action for effective cooperative management of the shellfish resources subject to Treaty harvest under the Court's decision of December 20, 1994. In effectuating the rights of the Tribes to take shellfish under the Treaties, this Order also recognizes the State's responsibilities for conservation of public shellfish resources, subject to the Treaty right to take fish at usual and accustomed places.

1.2 Goals and Procedures.

The Implementation Plan calls for interim and then long term management plans. The management plans are to provide both Treaty and non-Treaty shellfishers, subject to their respective regulatory authorities, the opportunity to harvest their respective shares in an orderly manner, consistent with resource protection. The Plan also provides specific procedures for tribal and non-tribal harvest on State and private lands and waters. To the extent specific procedures in section 6 (applicable to commercial Shellfish Growers) and 7 (applicable to Private Property Owners) conflict with general provisions of the Plan,

the relevant specific provisions apply to the Growers and Owners, respectively.

1.3 Application of Law.

All provisions of this Plan and all management plans that are developed from it must comply with the Court's December 20, 1994 decision. No part of this plan is intended to repeal any prior decision in *United States v. Washington*.

1.4 Requirement of Coordination Among Tribes.

The Tribes will be responsible for coordination with all affected Tribes in the development of management plans or compliance with the interim plan, below. This requirement, however, shall not relieve any party of the obligation to give any notice required herein to any affected party.

1.5 Tribes Bound.

The Tribes bound by this implementation plan are: Lummi, Nooksack, Upper Skagit, Swinomish, Tulalip, Muckleshoot, Suquamish, Puyallup, Nisqually, Squaxin Island, Skokomish, Port Gamble S'Klallam, Jamestown S'Klallam, Lower Elwha S'Klallam, Makah, Hoh, Stillaguamish, Sauk Suiattle and Quileute. Other Tribes may become signatories to this Plan by the agreement of all parties to the Plan or by order of the Court.

1.6 Shellfish Sanitation Consent Decree.

The Consent Decree Regarding Shellfish Sanitation Issues, entered by the Court on May 4, 1994, specifies those public health requirements to be applied to Treaty shellfishing activities and establishes an intergovernmental, cooperative system for monitoring, enforcement, and dispute resolution. This Implementation Plan, along with all management plans and agreements reached pursuant to it, shall be developed, applied and interpreted in a manner consistent with that Consent Decree.

1.7 Status of Headings.

The headings in this Implementation Plan are for the convenience of the reader and are not intended to change the substance of the Plan.

2. PRINCIPLES OF SHARING THE SHELLFISH RESOURCE.

2.1 Effective Date of Allocation; Mandating Equitable Adjustments.

The effective date of this Implementation Plan for purposes of calculating allocation of shellfish between tribal and nontribal harvest shall be the date of this Order, unless otherwise agreed between the State and Tribes. With respect to shellfish on the Growers' and Owners' property, the allocation between tribal and non-tribal harvest shall commence on the date a Tribe gives notice pursuant to Plan sections 6.1 and 7.1, respectively.

2.2 Cooperative Management.

Where data is not available to determine the total allowable harvest for purposes of allocation between the Tribes and State, the Tribes and State shall develop a cooperative approach to management with the goal of maximizing harvest and equalizing allocation, consistent with conservation of the resource. This shall apply for both interim and permanent management plans and agreements.

2.3 Sustainable Harvest Biomass.

"Sustainable harvest biomass" means the approximate portion of a shellfish resource that can be harvested from a shellfish population on an annual basis in perpetuity. It is analogous to the "sustained yield" or "harvestable surplus" that biologists, using sound and accepted management methods, determine can be harvested from a shellfish bed, or mobile shellfish population, while preserving the ability of the remaining shellfish population to maintain annual production of the sustainable harvest biomass in perpetuity. For certain species, such as crab and shrimp, the sustainable harvest biomass may be achieved by agreed restrictions on the size or sex taken, and/or quantity or location by limiting the type of gear used for the fishery, ensuring that a portion of the biomass remains unharvested.[22]

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[22] This definition corresponds with the relief provided for tribal harvest of anadromous fish: the court defined the harvestable number of fish in terms of that amount that would not impair the amount of fish needed to maintain the run at existing levels. *See generally Washington I*, 384 F.Supp. at 405-407, 409, 417.

2.4 Management Objectives.

"Management Objectives" means the objectives of each party to meet their respective goals using their share of the harvestable surplus of the resource and the biological goals for the continued long term health of the resource.

2.5 Sharing Provisions.

Each Tribe may take, from natural beds, up to fifty percent of the sustainable harvest biomass of any shellfish species within the usual and accustomed areas for that Tribe. The sharing shall be achieved by coordinated management plans. Such sharing shall be subject to the following provisions:

a. *Sharing Sustainable Harvest Biomass.* The sustainable harvest biomass of a shellfish bed or shellfish resource subject to the Treaty right shall be determined on an annualized basis or other agreed periodic basis. The sharing of shellfish shall take into account all commercial and non-commercial harvests from the sustainable biomass of shellfish. For intertidal areas, the sustainable harvest biomass shall be shared on a bed by bed basis,[23] or on other established boundaries of a public land[24] parcel for sharing the shellfish. Where the sustainable harvest biomass cannot be calculated for a species or area, the harvestable amount to be shared shall be determined using the best fishery management information and practices that ensure conservation and maintain production of shellfish in the area harvested.

b. *Adjusting Imbalances.* Unless otherwise agreed, all management plans adopted pursuant to this Implementation Plan shall include provisions for addressing imbalances in harvest where a party was not afforded the opportunity to attain its share. The means for addressing imbalances may vary

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This definition, however, is intended to apply to the order sharing shellfish harvests, not to change existing standards regarding the limited application of state laws to treaty Indians exercising treaty fishing rights.

23 Where a shellfish bed straddles publicly and privately owned land, the provisions of this section apply to the shellfish on public land only.

24 For purposes of this Implementation Plan, "public land(s)" means any land owned by the State, or any of its subdivisions or agencies, unless such land is being leased to a Shellfish Grower.

depending upon the species, the management techniques used for specific fisheries, and management imprecisions.

c. *Independent Management Discretion.* The State and affected Tribe(s) shall have discretion to decide their respective management objectives for the harvest of their respective shares, whether commercial, recreational, ceremonial, or subsistence use.

d. *Overlapping Usual And Accustomed Areas.* Where two or more Tribes have overlapping usual and accustomed areas, then the combination of tribal harvesting shall not exceed fifty percent of the sustainable harvest biomass, leaving at least fifty percent of the sustainable harvest biomass for non-Indian management.

e. *Intertribal Allocation.* Allocating the tribal share among affected Tribes shall be determined by the affected Tribes, with the intertribal agreement as appropriate provided to the State. Lack of an intertribal sharing agreement shall not entitle a combination of Tribes to take more than fifty percent of the sustainable harvest biomass of shellfish in a given area.

f. *Equal Opportunity.* In sharing the opportunity for harvest of a shellfish resource, the State and Tribe may also consider the time of fishing, quality of the shellfish, ease of harvesting, and catch per unit effort for the shellfish involved to ensure that there is equal sharing of the harvest opportunity.

g. *Polluted Shellfish And Shellfish Not Available.* In allocating the sustainable harvest biomass between the State and affected Tribe(s), shellfish beds that are not presently harvestable due to pollution, development, or other physical causes shall not be counted in the biomass of shellfish beds which can be harvested. This shall not prevent a relay harvest of polluted shellfish in accordance with the Consent Decree Regarding Shellfish Sanitation Issues. Any such relay harvest from a polluted shellfish bed shall be accounted for and allocated separately from sharing of shellfish beds that are approved under Consent Decree.

h. *Planted Oyster Beds.* Oysters planted on public lands, such as on certain State Parks, that would not exist but for the State having planted those oysters are not subject to a tribal share. The Treaties did not reserve any right to such artificial oyster beds.

i. *Beds Staked And Cultivated.* To the extent that any shellfish bed on public land is within the definition of "any beds staked or cultivated by citizens" in the Court's relief applicable to commercial Shellfish Growers, then such shellfish beds on public lands are not subject to tribal sharing.

Further, the provisions of section 6.3, related to the creation of new artificial beds, are applicable if the State proposes to create any new artificial beds on public land.

3. LONG-TERM AND INTERIM MANAGEMENT PLANS FOR THE SHARING OF SHELLFISH RESOURCES ON PUBLIC LANDS OR IN PUBLIC WATERS.

3.1 *Management Plans.*

Ultimately, tribal and non-tribal harvests of shellfish on public lands and from public waters[25] will take place pursuant to management plans.[26] Those management plans will be developed between the Tribes and State on a government-to-government basis. Once agreed by the parties to the plan, each such management plan shall be effective without further approval of the Court and shall have the same force and effect as this Order.[27]

3.2 *Harvests Included.*

All tribal harvests of shellfish by Tribes participating in this Implementation Plan, and all non-tribal harvests in areas included within the collective usual and accustomed grounds

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25 The relief provided in the above section applies to all shellfish species located *on or in* all public owned lands, (such as clams, oysters, geoduck clams, and mussels that are embedded in or attached to public owned lands), and to all mobile shellfish species that *live in* the waters of the State, (such as crab, shrimp, sea cucumber, sea urchin, squid, octopus, and others).

Separate provisions of the Implementation Plan define the State's role in tribal harvest of shellfish on private tidelands, or commercial Shellfish Grower lands.

26 As indicated in § 7, such interim and long-term management plans shall also contain provisions specifically applicable to harvest from non-commercial, privately owned tidelands.

27 To the extent the parties have already entered interim agreements, those agreements have the same status as future management plans or agreements under this Plan.

and stations of the Tribes participating in this Implementation Plan, will be subject to management plans adopted pursuant to this Implementation Plan.

3.3 *Interim Plan Needed.*

Because development of management plans is a long term process, an interim plan is needed to govern all shellfisheries pending adoption of permanent plans.

4. INTERIM PLAN FOR STATE AND TRIBAL HARVEST OF SHELLFISH ON PUBLIC LANDS OR FROM PUBLIC WATERS.

4.1 *Scope of Interim Plan.*

This interim plan shall govern shellfisheries from the date of entry of this Order until permanent or long term management plans are adopted for particular species of shellfish. The interim plan sets out procedures all persons and parties covered by this Implementation Plan shall follow until permanent or long term management plans are adopted.

4.2 *Closure of Commercial Shellfisheries.*

The State and Tribes shall close all commercial shellfisheries and prohibit the commercial landing of all shellfish on public lands or from public waters, within thirty days after entry of this Order, except where a signed interim agreement between the State and all affected Tribes is in place regarding a specific commercial shellfishery.

4.3 *Adjusting Non-commercial Fisheries.*

After entry of this Order, the State shall adjust non-commercial shellfisheries within forty-five days after any Tribe makes a written request to the Washington Department of Fish and Wildlife (WDFW) to do so, if necessary to ensure that no more than fifty percent of the harvestable amount will be taken by tribal or non-tribal fisheries, including commercial and non-commercial combined. A dispute over the necessity or extent of the adjustment to be made shall be subject to the dispute resolution procedure of sections 4.7 and 4.8.

4.4 *Shellfish Beds With Inadequate Data.*

For beaches where data is not available for determining the sustainable harvest biomass and allocation between the State and all affected Tribes, the affected Tribes and the State will:

a. manage the beach to allow for affected Tribes to take up to fifty percent of the jointly estimated shellfish harvest opportunity until more specific data is available.

b. jointly identify shellfish beds needing a survey and develop a prioritized list and time line to complete surveys and provide for more accurate management and sharing on these beaches, within efficient biological management.

4.5 *Opening A Fishery By Agreement.*

Where no interim agreement is in place thirty days after the entry of this Order, a shellfishery closed or adjusted pursuant to section 4.2 or 4.3 may only be opened or enlarged after compliance with the procedures in section 4.6. Shellfisheries may proceed at any time, however, if agreement is reached between the State and all affected Tribes, notwithstanding the procedures otherwise applicable under this section.

4.6 *Opening A Fishery Without Agreement.*

Where the State or a Tribe desires to open or enlarge a shellfishery that has been closed or adjusted pursuant to section 4.2 or 4.3, it shall comply with the following procedure (unless an interim agreement is in place):

a. Before proceeding, the State and all affected Tribes shall confer at least one time in an effort to reach agreement regarding the proposed fishery.

b. Failing agreement, the party (Tribe(s) or State) proposing to open the fishery shall provide to the other party a proposed regulation for the fishery, in writing, at least fourteen days before the fishery is scheduled to begin. The party proposing the harvest shall be able to provide a sound fisheries management basis for a determination that a harvestable surplus exists and that a fishery can be operated that will not interfere with the sharing principles ordered by this Court. However, this is not intended to shift the burdens, described below, associated with contesting a fishery. The regulation (or other documents

provided with the regulation) shall contain, at a minimum, the following information:

(1) The dates and hours the fishery will be open;

(2) The catch area(s) open for harvest;

(3) The type of fishery to be opened (commercial or non-commercial);

(4) The species to be taken, including an estimate of or upper limit on the amount to be taken and the basis of the estimate;

(5) The estimated effort;

(6) The gear to be allowed;

(7) Provisions for recordkeeping and harvest reporting, including a schedule to ensure a timely exchange of information; and

(8) Any other information necessary for a specific fishery (such as, for example, daily limits for non-commercial fisheries).

In addition, information regarding enforcement and monitoring plans for the fishery shall be available to the State or Tribes upon request.

4.7 *Contesting State or Tribal Regulations and Dispute Resolution.*

A Tribe or the State may object to a proposed regulation. The party objecting must state the objection in writing and serve it on the entity proposing the fishery not more than ten days after receipt of the regulation, and at least three working days before the fishery is scheduled to begin. The objection must be based on a well-founded assertion that the proposed regulation would result in:

(1) an overharvest on an allocation or conservation basis in violation of the standards set by the Court in *United States v. Washington*, or other conservation standards agreed to by the State and affected Tribes; or

(2) otherwise violate this Implementation Plan or other applicable orders of the Court. The objection must state the reasons for the objection, the data on which it is based, and any other pertinent information available to the objecting party.

4.8 *Dispute Resolution During Interim Plan.*

No contested fishery shall begin unless a decision is rendered by a Special Master to allow the fishery. To the extent necessary, the Special Master may order the State or affected Tribe to comply with the allocation and sharing principles described by this order. In addition, the following rules shall apply:

a. The objecting party shall arrange for a hearing to be held before a Special Master no more than ten working days from the date of service of the objection (see Dispute Resolution, section 9).

b. The Special Master shall render a decision no more than ten working days after the conclusion of the hearing. No fishery shall open until a decision is rendered by the Special Master.

c. Where an emergency exists, (for example, where the proponent's opportunity to fish may be lost by delay), the Special Master may change the above time limits if the party requesting a change in the time limits has acted in a diligent and timely manner.

4.9 *Obligation to Adjust Catch and Comply With Sharing Order.*

Where there is a shellfish harvest without agreement, the State or affected Tribe(s) shall either comply with this section as needed, or contest the regulation as provided above. When a Tribe authorizes the harvest of shellfish without agreement, then the State shall reduce or adjust State regulated harvests as necessary to allow for the proposed tribal harvest. State regulated harvests shall not take a tribal share of shellfish as defined by the sharing principles, above. Tribal or State fisheries opened under this subsection shall not exceed the tribal or State share authorized by this Court and shall be adjusted by the Special Master, if necessary, to comply with and not exceed the tribal or State share.

4.10 *Tribal Ceremonial Shellfish Harvests.*

Notwithstanding the provisions of section 4.2 through 4.9, a Tribe may open a fishery for unanticipated ceremonial purposes by emergency regulation for a specific time period and for a specific allowable harvest amount.

5. DEVELOPMENT OF PERMANENT PLANS TO GOVERN STATE AND TRIBAL HARVESTS OF SHELLFISH FROM PUBLIC LANDS OR PUBLIC WATERS.

5.1 *Order to Develop Plans.*

Long term management plans shall be developed separately for each species of shellfish (or groups of related species, such as all crab species) for which fisheries are to take place on public lands or from public waters. Those management plans may be divided into sub-plans for specific geographic regions, for types of fisheries (commercial, non-commercial; subtidal, intertidal; etc.), or on any other agreed basis. Each management plan shall govern both tribal and State shellfisheries. Unless otherwise agreed, each management plan shall be subject to comprehensive review and agreement by the State and Tribes every five years.

5.2 *Order to Share Information and Establish Planning Committees.*

The State and Tribes shall exchange all available information in either side's possession regarding the status of shellfish populations and fisheries taking place on those populations, in response to reasonable requests for the same, to assist in carrying out their management responsibilities.

5.3 *Joint Technical Working Committee.*

In addition, the State and Tribes shall establish a joint technical working committee to perform tasks, including the following:

a. Exchange and review new and existing information;

b. Establish assessment methodologies;

c. Identify and prioritize management needs;

d. Develop annual or other periodic management plans.

5.4 *Elements of permanent plans.*

In addition to complying with the allocation ordered by the Court or otherwise agreeing, certain basic elements should be included in all management plans between State and Tribe(s). Those elements include:

a. Definitions of relevant terms.

b. Procedures for identification of the location of shellfish resources.

c. Procedures for assessing and estimating shellfish populations and the sustainable harvest biomass.

d. Identification of geographic boundaries to be used for management and allocation of shellfish harvests (management or allocation "units"), including procedures for how and when boundaries can be modified once adopted.

e. Identification of management periods and the duration of management plans.

f. Procedures for establishing the amount to be harvested from each management area.

g. Procedures for establishing how allocations will be measured for each management or allocation unit. In intertidal areas, unless otherwise agreed or determined by the Court, harvest management shall afford both Treaty and non-Treaty harvesters the opportunity to harvest fifty percent of the harvestable shellfish resource on each public beach, or tideland parcel having established or agreed boundaries, so long as consistent with public health and conservation requirements.

h. Procedures for enacting pre-season and in-season regulations. These will include the amount of notice to be given be-fore a fishery begins and requirements for exchanges of information.

i. Provisions regarding the content of regulations. At a minimum, these will include identification of the management plan under which the regulation is issued, the

species to be harvested, the harvest areas, the purpose of the harvest, the gear to be used, the expected effort, the expected harvest, and the dates and times of opening and closing of the fisheries. Unless addressed in a Tribal Ordinance, the regulations will also identify the monitoring system to be used.

j. Provisions regarding law enforcement for Treaty and non-Treaty shellfishing.

k. Provisions for recordkeeping and harvest reporting shall include: commercial WDFW shellfish receiving tickets, Treaty Indian receiving tickets, agreed sport harvest estimates, and agreed Treaty Ceremonial and Subsistence estimates.

l. Provisions for identification of tribally authorized harvesters taking shellfish and tribal representatives engaged in surveys, population estimates, and other management activities, including tribal fish managers, as well as tribal enforcement personnel.

m. Provisions for modifications of management plans.

6. COMMERCIAL SHELLFISH GROWERS.

The parties are bound by the definitions prescribed by the Court in this Order, the December 20, 1994 Memorandum Decision and Order; and any other relevant order in *United States v. Washington.*

6.1. *Determination Of Location Of Beds.*

Determination of the location of artificial beds on property owned or controlled by a Grower is triggered by notice to the Grower of the Tribe's interest in commencing harvest.

6.1.1 Any Tribe interested in commencing harvest on property owned or controlled by a Grower shall provide notice to other affected Tribes and to the Grower. The notice shall specify the particular property owned or controlled by the Grower upon which harvest is to occur, and shall include the name, street and mailing addresses, and telephone number of a tribal representative. Upon receipt of this notice, the Grower shall then provide the requesting Tribe with the following: the location of all artificial beds on any property owned or controlled by the Grower; a list of the species of shellfish

currently harvested from the artificial beds and from which bed a particular species is harvested; and a description of the means used by the Grower to demarcate portions of the property for purposes of managing or keeping records of shellfishing activities.

In addition, the Grower shall provide the following information for each bed asserted to be artificial: all records showing seeding, graveling, transplanting or other activity relevant to determination of each asserted artificial bed's status as an artificial bed; and all other records or other information upon which the Grower relies to support the Grower's assertion that each bed is artificial. However, such information shall not be required where an artificial bed is presumed to exist because the bed consists of the following: (1) a species that is known not to reproduce naturally in that location, such as Pacific Oysters outside of Hood Canal or (2) shellfish cultivated by an off-bottom or equivalent method.

The Grower shall provide all the information required by this section to the Tribes in writing within sixty days of the receipt of any tribal request. At a Grower's request, the Tribe shall sign a nondisclosure agreement which will protect any sensitive information provided to the Tribes. The presentment and signing of any nondisclosure agreement shall not be construed as giving the Grower more time in which to provide the required information to the Tribe.

6.1.2 The Tribes shall review the data provided by the Grower(s). In addition, the Tribes shall be given the opportunity to inspect the artificial beds located on the land owned or controlled by the Growers. The Tribes shall give the Grower fourteen calendar days' notice prior to the proposed date of inspection. The inspection shall occur as noticed by the Tribes and shall take place at a reasonable time. The Grower may accompany the tribal representatives during the inspection.

6.1.3 If the parties agree that the Grower has accurately stated the nature, extent, and location of all artificial beds located on the property, the parties shall then determine the sustainable harvest biomass, as defined by this Plan in section 2.3, from the Grower's beds subject to a tribal share. The sustainable harvest biomass shall not include shellfish found in areas that are closed to shellfishing due to pollution. If the parties are unable to agree on the sustainable harvest biomass for a particular bed or group of beds, the matter shall be submitted to a Special Master.

6.1.4 If the parties agree on the nature, extent, and location of all artificial beds and the sustainable biomass from the beds subject to a tribal share, harvest shall commence according to the provisions specified below. Harvest shall also commence to the extent that there is agreement as to any bed or group of beds, meaning that the parties need not be in full agreement as to the location of all artificial beds and as to the sustainable biomass of all beds subject to a Treaty share prior to beginning any harvest. To the extent of any disagreement which the parties are unable to work out themselves, the parties shall submit the issue to a Special Master. The burden of proof shall be with the party asserting that a particular bed is an artificial bed.

6.1.5 *Times When The Tribes May Give Notice Under Section 6.1.1.*

Tribes initially have one year after the date of this Implementation Plan to give notice pursuant to section 6.1.1 to Growers subject to the Implementation Plan. After that year, a Grower may operate free of additional notices or tribal claims for a three-year period. At the end of the three years, the Tribes shall have a ninety-day period during which they may provide notice pursuant to section 6.1.1. At the end of that ninety-day period, the Grower shall again have a three-year period free from additional tribal notices or claims. The ninety-day open period for giving notice under section 6.1.1 shall continue to alternate thereafter with a three-year period during which such notice may not be given.

6.2 *Harvest Plans.*

Not later than thirty days after a final determination has been made of the location and of all artificial beds, whether by agreement or through dispute resolution, the Tribe shall provide the Grower with a written statement describing its plan for sharing the harvest of shellfish outside the artificial beds including the general times of the proposed harvests.

The Grower shall then review the Tribe's proposal to determine if it is compatible with the Grower's farming operation. If the Grower determines that the Tribe's submitted plan is not compatible with his or her particular farming operation, the Grower may modify or revise the tribal plan accordingly. The Grower shall have the final word on how a tribal harvest will be conducted.

Any harvest plan, whether one drafted by the Tribe or by the Grower shall contain, at minimum, the following time, place, and manner restrictions on tribal access and harvest in order to protect the Grower's farming operation: (1) the time for a tribal harvest; (2) the species of shellfish and the location from which they will be harvested; (3) the number of tribal harvesters that can safely be present on a bed to conduct a harvest; (4) the appropriate method of access that will avoid damage to the Grower's crops; (5) the method of harvest, e.g., blanket or spot digging.

Although any tribal harvest will be done according to the requirements set forth by a particular Grower, the Growers are expected to act in good faith and to not impose any more restrictions on a Tribe than are necessary to protect the Grower's farm. In addition, the Grower may not so restrict the Tribe as to deny the Tribe the right to its tribal share. With respect to any harvest plan drafted by a Grower, the affected Tribe(s) may take the plan to a Special Master only if the plan prevents the Tribe(s) from taking the tribal share.

If, during any harvest, the Tribe takes shellfish from beyond the agreed upon boundaries or causes any damage to the Grower's property, the parties shall attempt to resolve the matter informally. If there is no resolution, the parties shall submit the matter to a Special Master; the Special Master can award appropriate damages or impose some other remedy.

No Grower may, instead of providing a Tribe the opportunity to harvest, insist that the Tribe take a money payment or take shellfish harvested by the Grower, as the tribal right is a right to take the shellfish by a tribal harvest. Nothing in this Plan, however, shall be interpreted to foreclose the parties from voluntarily negotiating such an agreement; the Grower simply may not force such an agreement on any Tribe.

6.3 *Creation Of New Artificial Beds.*

Nothing in this Plan shall be construed to limit a Grower's ability to create a new artificial bed. If a Grower plans to create a new artificial bed, the Grower shall give written notice to the affected Tribe(s) of his or her intention. The notice shall be provided at least forty-five days prior to the proposed creation of the bed and shall include the following: the location and species of the proposed bed. In addition, the notice shall

explain the basis for the Grower's belief that there is no natural bed in the location where the artificial bed is planned.

If a Tribe contests the Grower's conclusion that there is no natural bed in the location of the proposed artificial bed, the Tribe shall so notify the Grower within fifteen days of receiving the notice. The Tribe shall explain the basis for its position. In addition, the Tribe shall be given the opportunity to inspect the location of the proposed bed upon seven days' notice to the Grower. The inspection shall then occur as noticed by the Tribe at a reasonable time. The Grower may have a representative accompany the Tribe during the inspection.

If the parties are not able to resolve the matter, it shall be submitted to a Special Master. The party asserting that the area proposed for the new artificial bed is not a natural bed shall have the burden of proof. The Grower, pending the resolution of the matter by the Special Master, will be permitted to continue with any cultivation activities at his or her own risk: that is, the Grower may proceed with his or her plans at the risk that the Special Master could hold that the proposed area contains a natural bed which may not be staked or cultivated under the Treaties.

6.4 *Harvest of clams subjacent to artificial oysters.*

Because a Grower's oyster crops are at greatest hazard when clams are harvested from underneath the oyster crop, any agreement to harvest the natural clams subjacent to artificially grown oysters shall schedule the time for the tribal harvest between the commercial Grower's harvest of the oysters and replanting of oyster seed. The Tribe shall make itself available to harvest the clams within as small a timeframe as forty-eight hours from the harvest of the oysters by the Grower.

In those cases where the Grower himself or herself does not harvest the underlying clams in order to protect a fragile oyster crop, however, the Grower need not allow tribal harvest of the underlying clams.

6.5 *No General Regulation of Grower's activities.*

Nothing in this Plan shall be interpreted as interfering in any way with the right of a Grower to engage in predator control activities or in any other activities designed to manage or benefit the Grower's land. Moreover, nothing in this Plan shall constitute a limit on a Grower's right to redesign his or her

tidelands, even if such redesign results in the destruction of a natural bed (e.g., constructing a dike for Olympia Oysters which causes the substrate to change and eliminates a clam bed).

7. PRIVATE PROPERTY NOT USED FOR COMMERCIAL SHELLFISH GROWING.

Determination of the location of shellfish populations, population estimates, and regulations governing the harvest of shellfish from privately owned tidelands not being used for commercial shellfish production shall be subject to both interim and permanent management plans adopted by the Tribes and the State. Included within those plans, however, shall be additional measures applicable to harvests from privately owned tidelands, as described below.

7.1 *Population Surveys And Population Estimates.*

Tribes shall survey privately owned tidelands to determine the existence of shellfish populations prior to commencing harvest on a particular tideland.

The Tribes' surveys and population estimates shall be made consistent with the following rules, unless otherwise agreed between a Tribe and a Property Owner:

7.1.1 A survey to determine whether shellfish are present shall occur on each privately owned beach no more than once every three years. The cost of the survey is to be paid for by the Tribe. The manner and method of any survey must be of the type currently in use by the State of Washington.

7.1.2 An on-site population estimate shall occur no more than once per year. The cost of any estimate shall be paid by the Tribe.

7.1.3 Shellfish population information and data regarding a privately owned beach shall be shared with WDFW and the Property Owner.

7.1.4 Surveys and population estimates shall be done at reasonable times during daylight hours whenever feasible. Night surveys shall occur only when necessary.

7.1.5 Notice of a survey or population estimate shall be provided to the Property Owner no less than one month in advance of the survey or estimate. The notice shall include the

name, street and mailing addresses, and telephone number of a tribal representative responsible for the administration of the survey or population estimate.

7.1.6 Notice shall be provided by certified mail, fax, or personal service. The Tribes may chose the type of service. The Private Property Owner shall provide the address or phone number to the Tribe where that Owner will accept service of the notice. If such information is not provided by the Private Property Owner to the Tribe, notice need only be by publication.

In addition, survey schedules will be made available on a telephone hotline operated by the Tribe, if the Tribe has the means to provide such a hotline.

7.1.7 The Property Owner and the State may have representatives present during the survey and population estimate.

7.1.8 The Tribes need not conduct a comprehensive survey or population assessment of all properties potentially subject to tribal harvesting before being permitted to exercise Treaty harvest rights. However, as to a particular property, a survey or population assessment must be done prior to any tribal harvest.

7.1.9 Nothing in this Plan shall prevent a Private Property Owner from conducting his or her own survey or population assessment. The Private Property Owner may then, if the results of such a survey or estimate differs from the results of the tribal survey or estimate, contact the Tribes in writing and inform them of any discrepancy. If the parties are unable to resolve the matter, it shall be submitted to the Special Master according to the procedure set forth in this Plan.

7.2 *Tribal Harvest.*

In addition to the rules governing tribal harvests that are contained in management plans developed with the State, tribal harvests from private tidelands shall also be governed by the following requirements:

7.2.1 A tribal regulation opening private property for shellfish harvesting shall take into consideration the density of shellfish present and the size of the area to be harvested and limit the number of persons who may harvest accordingly.

7.2.2 The regulation opening private property for shellfish harvesting shall provide for monitoring and enforcement of the harvest. The regulation shall also ensure that proper sanitation procedures will be followed by all tribal harvesters.

7.2.3 The regulation opening private property for shellfish harvesting shall indicate the quantity of shellfish that may be taken, limits that apply to individual harvesters, if any, the purpose of the harvest (commercial, subsistence, ceremonial, or a combination), and the dates and times when harvest may take place.

Harvests may occur at night only if necessary. All harvests of properties less than 200 feet in width shall be limited to five days per calendar year. If a property is 200 feet or wider along the beach front, the number shall be increased by one additional harvest day per calendar year for every additional fifty feet of property.

7.2.4 There shall be no upland access to the private tidelands. The Tribes may access the private tidelands by water, across public lands, or by public rights of way only. Nothing in this Plan, however, shall prevent a Private Property Owner from voluntarily agreeing to upland access, although no Tribe has a right to insist on such access from the Tideland Owner.

7.2.5 Notice of a tribal harvest on private property shall be provided to the Property Owner and WDFW no less than one month in advance of the harvest. The notice shall include the name, street and mailing addresses, and telephone number of a tribal representative responsible for the administration of the harvest.

7.2.6 Notice shall be provided by certified mail, fax, or personal service. The Tribes shall chose the method of service. The Private Property Owner shall provide the address or phone number at which such notice will be received. If no address is provided, notice may be by publication.

7.2.7 If during any harvest, the Tribe damages the property of a Tideland Owner or in any way fails to harvest as stated in the notice provided to the Owner, the Owner may submit the issue to the Special Master as set forth in this Plan.

7.3 *Dispute Resolution.*

A Private Property Owner may challenge a proposed tribal harvest of shellfish from their property through the dispute resolution procedure of section 9 by complying with the following requirements:

7.3.1 An objection to a proposed tribal harvest must be made in writing to the Tribe's fishery department, stating the nature of the objection, the reasons for the objection, any data upon which the objection is based, and identifying any documents upon which the objection is based.

7.3.2 An objection must be based on a claim that the Tribe's plan for harvest is not consistent with the Court's orders in this case, an applicable management plan developed pursuant to this Implementation Plan, or other applicable law.

7.3.3 An objection to a proposed tribal harvest must be received by the Tribe not less than five working days before the harvest is scheduled to begin.

7.3.4 If the Property Owner posts a bond in the amount of $10 per lineal feet of waterfront of the property at issue, the Tribe may not harvest pending the outcome of the dispute resolution.

7.3.5 The Special Master shall have discretion as to whether a decision will be made based upon the written submissions of the parties or after a live hearing.

7.4 *Rights of Private Property Owners*

Nothing in this Plan shall be interpreted to limit in any way the rights of a Private Property Owner to build docks or other structures on their property.

8. MISCELLANEOUS PROVISIONS.

8.1 *Proposals To Establish New Artificial Shellfish Beds.*

8.1.1 The State shall exercise powers granted under State law regarding permits needed for shellfish enhancement (shellfish transfer permit, import permit, Hydraulic Project Approval). A person seeking to plant shellfish seed, place gravel or other substances, or otherwise enhance natural

shellfish populations through additions to the natural environment in or beneath state waters, shall comply with these requirements. When an application is received to undertake such an activity, the authorizing Department shall within five working days notify the Tribes by mailing a copy of the application to each affected Tribe's fishery department.

8.1.2 Before granting such a permit application, the appropriate State Department may ascertain the status of existing shellfish populations, if any, where the activity is proposed to occur, to determine whether a natural shellfish bed exists. Where a Department of the State performs the assessment of existing shellfish populations, the Department shall establish procedures whereby the Tribes shall be afforded the opportunity to participate in the assessment of the status of the existing shellfish populations. Where the State chooses not to perform the assessment, the Tribes may perform an assessment.

8.1.3 Whenever the State proposes to grant a permit under section 8.1.1, it shall notify the Tribes at least twenty working days before issuance of a permit. The State shall maintain copies of all documents that establish the basis for the granting of the permit and make them freely available to the Tribes at any Tribe's request. A decision to issue a permit, and the State's conclusion, if any, regarding the presence of a natural shellfish bed, may be challenged by a Tribe and is subject to the dispute resolution procedure if agreement is not otherwise reached.

8.1.4 Any person to whom a permit is issued to enhance shellfish production for commercial purposes shall be subject to any applicable provisions of this plan and the Court's orders to the extent of tribal Treaty rights.

8.2 *Proposals To Lease Tidelands Or Bedlands For Purposes Of Commercial Shellfish Growing.*

The purpose of this section is to address state leasing of tidelands and bedlands for shellfish harvest and production and to insure any Treaty right to harvest shellfish from such leased premises is addressed prior to leasing. Public lands under lease shall be considered the same as property owned by the lessee during any lease, and are subject to this court's provisions for private property or Growers' property. The following additional provisions apply for all new or renewal leases for shellfish harvest or cultivation.

8.2.1 *State Notice to Tribes.*

Whenever the State proposes to lease tidelands or bedlands for purposes of a commercial shellfish operation, then the State shall give affected Tribes notice of the lease application and be provided a date certain when the Tribes can communicate to the State regarding the assertion of a Treaty harvesting right to shellfish on the property, in accordance with this section. Notice to the affected Tribes shall include a description of the use to be authorized by the lease. The State shall evaluate the land to be leased to determine whether a natural shellfish population exists. The Tribes shall be afforded the opportunity to participate in the State's assessment of whether a natural shellfish population exists on the land. The results of any state evaluation shall be communicated to the Tribes at least thirty calendar days before a lease is issued. The underlying data and documents shall be made available to the Tribes.

8.2.2 *Tribal Assertion of Treaty Right on Leased Land.*

If an affected Tribe(s) contends that there is a natural shellfish population subject to Treaty harvest by the Tribe on property to be leased, the affected Tribe may notify the Washington Department of Natural Resources (DNR) in writing at least ten days before the proposed date of leasing. The notice shall describe the shellfish to which the Tribe asserts a Treaty right, the basis for that information, and the area and shellfish involved. Upon timely receipt of such notice, DNR shall not lease the property until compliance with paragraph 8.2.3. or 8.2.4, below. If a Tribe does not provide notice under this paragraph to DNR after DNR has complied with paragraph 8.2.1, then the Tribe shall not take shellfish from the leased property for the initial term of that lease, or ten years, whichever is shorter.

8.2.3 *State and Tribal Agreement.*

If a Tribe has provided notice under paragraph 8.2.2, the State and Tribe and/or prospective lessee may agree to a plan where the Tribe's Treaty right to take shellfish from the land to be leased is addressed before issuance of the lease. Any such agreement in writing shall be binding on the State, Tribe, and other persons who enter it for the term of the agreement.

8.2.4 *Dispute Resolution.*

Absent an agreement between the State and/or proposed lessee for tribal harvest from the bed to be leased, a Tribe or the State may seek dispute resolution. The dispute shall be heard by the Special Master pursuant to section 9, and the lease shall not be issued until the dispute resolution procedure has been completed. At such dispute resolution, the Special Master shall determine whether or not the leased activity authorizes the taking of shellfish subject to Treaty harvest. If the lease does not, then the lease may be issued. If the land to be leased contains shellfish subject to Treaty harvest, then the Special Master shall determine the tribal harvest of a Treaty share of such shellfish, or allow the State and Tribe to reconsider agreement regarding tribal harvest.

8.2.5 *State Renewals.*

Whenever the State proposes to renew a lease of tidelands or bedlands for purposes of a commercial shellfish operation, if the presence or absence of natural shellfish populations has not previously been completed, the procedures of part 8.2.1 shall be followed as if a new lease is being proposed. If an affected Tribe has previously not objected to leasing of the property after notice pursuant to Section 8.2.1, then the State need only provide such Tribe notice of its intent to lease or renew lease. If the lease only allows the lessee to grow and harvest a species known not to reproduce naturally in the lease location (such as Pacific Oyster beds outside areas of Hood Canal), or to grow and harvest shellfish cultivated by an off-bottom or equivalent method and there has been no natural shellfish population identified on the site during past leases, then the State may satisfy paragraph 8.2.1 by informing the affected Tribe of the nature of the proposed lessee use. The Tribe, however, may inspect such property or assert a claim under 8.2.2, if there is a natural shellfish population subject to a Treaty harvest.

9. DISPUTE RESOLUTION.

Except where otherwise agreed or stated herein, the following dispute resolution procedure shall govern all disputes arising from the implementation of this Plan.

9.1 *Selection Of A Special Master.*

The parties shall designate persons ["designees"] to serve as Special Masters. One person shall be designated by each of the following: [a] the Tribes; [b] the State of Washington; [c] the Shellfish Growers; and [d] the Private Property Owners. In the event a designee becomes unable or unwilling to continue service, the party that designated that individual shall designate a replacement within thirty days of the termination of the prior designee's service. Any party may change its designee upon thirty days' notice to the other parties. Such changes in designees need not be approved by the Court.

The four designated persons shall serve as a panel of Special Masters for purposes of this dispute resolution procedure; however, a single Special Master will hear and determine each dispute referred to the panel. A random drawing will be used to select the Special Master from the panel for each dispute.

9.2 *Procedure For Hearings Before A Special Master.*

The Special Masters will establish the procedures to be used in hearing disputes; those procedures may be informal, but shall include the following, except where specified otherwise in this implementation plan:

9.2.1 An opportunity for all parties to a dispute to present their evidence and arguments in writing and orally.

9.2.2 An opportunity for all parties to a dispute to respond to or challenge the evidence and arguments presented by other parties.

9.2.3 The opportunity for all parties to the dispute to compel the production of persons or documents from other parties that are necessary for full consideration of the matter in dispute.

9.2.4 In addition to considering evidence presented by experts called by a party to the dispute, the Special Master may consult with persons with technical expertise as necessary to the resolution of disputes. The persons consulted shall not be associated with the Tribes, any agency of the State of Washington (other than academic institutions) or any other person affected by the outcome of the dispute, absent agreement

of all parties to the dispute. Advice received from a technical expert shall be shared with all parties to the dispute.

9.2.5 The Special Master shall issue a written opinion stating the decision and the reasons for the decision within ten working days of the conclusion of the hearing or the submission of evidence by the parties to the dispute, whichever is later, unless agreed otherwise by the parties and the Special Master. In fashioning resolution to a dispute, a Special Master shall have no authority to eliminate the Treaty fishing rights of an entire Tribe. The Special Master may, however, order that the Tribe pay damages or may implement some other appropriate remedy.

9.2.6 In all cases the Special Master shall assess his or her costs of the hearing against the parties to the hearing in equal amounts except where the Special Master finds that the position of one or more parties was not substantially justified by facts or law, in which case the Special Master shall assess such party or parties all of the costs.

9.2.7 The Special Master shall not be required to hear or consider disputes in the order in which they are presented. The Special Master shall consider a dispute on an emergency or expedited basis when a delay would make the dispute moot due to the closure of a fishing season or other equivalent circumstance.

V. Order

In connection with the execution of the Implementation Plan, the Court HEREBY ORDERS as follows:

1. That the parties enter into management agreements as may be necessary to comply with this Order and execute the Plan.

2. That parties comply with the terms of this Order and comply with all management plans adopted pursuant to this Order, to the extent applicable to that party.

3. That the Defendant State of Washington and its Agencies and Departments, including their officers, agents, and employees are HEREBY ENJOINED from:

a. arresting or prosecuting members of plaintiff Tribes for harvesting shellfish at the usual and accustomed places of his or her Tribe, when the Tribe has allowed the

shellfish harvest in accordance with the provisions of the Court's Implementation Plan; and

b. applying or enforcing state statutes or regulations to regulate, limit, or restrict the exercise of Treaty fishing rights, unless such are fully consistent with the Court's decisions and Orders.

4. *Provided, however*, that this injunction shall not modify or alter any provision of the Shellfish Sanitation Consent Decree entered by the Court on April 21, 1994.

5. That on or before September 29, 1995, the parties in this case designate persons to serve as the original panel of Special Masters for the resolution of any disputes, pursuant to Section 9 of the Plan.

6. That judgment be entered in this action consistent with this Order and the Court's December 20, 1994 Memorandum Decision and Order.

IT IS SO ORDERED

IT IS FURTHER ORDERED that the Clerk of the Court shall serve, by United States mail, copies of this Order on counsel for the parties in this matter.

909 F. Supp. 787

UNITED STATES of America, Plaintiff,

v.

STATE OF WASHINGTON, Defendant.

No. 9213.

United States District Court,
W.D. Washington.

Dec. 18, 1995.

United States and 16 Indian tribes sought declaratory and injunctive relief concerning off-reservation treaty right shellfishing. The District Court, 898 F.Supp. 1453, approved order implementing rights under Shellfish Proviso of Stevens Treaties. United States and tribes moved to amend order. The District Court, Rafeedie, J., sitting by designation, granted motion as to selection process of special masters, denial of tribal access across private land, and provision permitting assessment of damages against tribe, and denied motion as to minimum density figure of manila clams and as to definition of cultivated shellfish beds.

So ordered.

[HEADNOTES OMITTED]

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MEMORANDUM OPINION AND ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO ALTER OR AMEND THE JUDGMENT

RAFEEDIE, District Judge.

Introduction

The Court issued an Order on August 28, 1995, *United States v. Washington*, 898 F.Supp. 1453 (W.D.Wash.1995), implementing its interpretation of the Stevens Treaties between a number of Indian tribes and the State of Washington.[1] Pursuant to Fed.R.Civ.P. 59, the United States and the Tribes have moved to amend or alter the Order on five grounds: (1) the selection process of Special Masters is flawed; (2) the denial of Tribal access across private land is in conflict with Supreme Court authority; (3) the minimum density figure of manila clams is in error; (4) the definition of "cultivated" shellfish beds is too broad; and (5) the provision allowing the imposition of damages against the Tribes is legally erroneous.

For the reasons that follow, the Court HEREBY GRANTS the motion as to the selection process of the Special Masters, the denial of Tribal access across private land, and the

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[1] The Court's interpretation of the Treaties is set forth in the memorandum opinion *in United States v. Washington*, 873 F.Supp. 1422 (W.D.Wash.1994).

damages provision, and HEREBY DENIES the motion as to the minimum density figure of manila clams and as to the definition of cultivated shellfish beds.

Standard for Altering or Amending Judgments

A motion to alter or amend a judgment is made pursuant to Fed.R.Civ.P. 59(e). The grounds for reconsideration of a judgment are: "if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *School District No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir.1993), *cert. denied*, --- U.S. ----, 114 S.Ct. 2742, 129 L.Ed.2d 861 (1994).

In this case, the moving parties do not argue that there is newly discovered evidence or that there has been an intervening change in controlling law. Thus, the Court need only consider whether the challenged aspects of its Implementation Order involve clear error or are manifestly unjust.

Discussion

I. Special Master Selection Provision

Dispute resolution is governed by § 9 of the Implementation Order. Each of the following groups is entitled to designate one Special Master: the Tribes; the State of Washington; the Shellfish Growers; and the Private Property Owners. Any group may change its designation upon thirty (30) days' notice. § 9.1.

The four Special Masters serve as a panel for disputes; however, in a dispute, one Master is selected randomly to hear the dispute.

1. Challenges to the Provision

The United States and the Tribes argue that § 9 of the Implementation Order presents three problems. First, they argue that the pool of four Masters is tilted three to one against the Tribes, and therefore in any dispute they are three times less

likely to have a Master biased in their favor selected than one who is biased against them.

Second, the moving parties argue that § 9 violates Fed.R.Civ.P. 53--which governs the designation of Special Masters--because Rule 53 contemplates that the Court will select the Master, whereas § 9 allows the parties to do so.

Finally, the United States and the Tribe argue that § 9 is unconstitutional because it violates the Tribes' due process rights by having their disputes resolved in front of biased decisionmakers, particularly since there is no provision for judicial review of the Master's decision.

2. Analysis

a. Three to One Bias

Although the moving parties present a superficially compelling argument that the pool of Special Master is biased against them at three to one odds, their analysis is exaggerated. Assuming that the parties all designate Special Masters who are biased in favor of the designators--a bias that has yet to be shown[2]--the odds are not three to one that the Indians will draw an adverse Master.

Instead, the proper analysis is to consider the possible disputes that will arise. Each of the other parties is adverse to the Tribes, but not necessarily aligned with the others. Consider, for example, a dispute between the Tribes and the Private Property Owners. The only Masters selected by interested parties are the ones designated by the Tribes and the Owners. Thus, there is a 50 percent chance that the dispute will be heard by a Master selected by a party with no interest in the dispute (the State and the Shellfish Growers). There is a 25 percent chance that the Master selected will be that designated by the Tribes and a 25 percent chance that the Master selected will be that designated by the Owners--equal odds.

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[2] Whether the selection process as currently formulated in the Implementation Order leads to the selection of biased Special Masters is a different question that may not be entirely ripe for presentation.

Indeed, to adopt the United States' proposal of allowing the Tribes to designate three Masters (out of six) in the pool would actually tilt the odds in favor of the Tribes. Under this proposal, the Tribes would have a 50 percent chance of having one of their Masters resolve any dispute, while the defendant party would have only a 16 2/3 percent chance of having its Master selected. Only 33 1/2 percent of the time would the dispute be resolved by a Master selected by a noninterested party. The United States' proposal is obviously inferior to the Court's current scheme.

b. Rule 53

Rule 53(a), which governs the appointment of Special Masters, states in relevant part as follows: "The court in which any action is pending may appoint a special master therein."

There is little practical difference between § 9 of the Order and a system whereby the parties nominate Masters to be selected by the Court.

It appears that what troubles the United States the most is that the Order provides no guidance for what sort of qualifications are necessary or even desired in the Masters. Also troubling the United States is the provision that Masters can be "undesignated" by the designating party without Court approval.

c. Due Process

Finally, the parties cite a number of cases for the proposition that decisionmakers must be unbiased and impartial. *Schweiker v. McClure*, 456 U.S. 188, 195, 102 S.Ct. 1665, 1669-70, 72 L.Ed.2d 1 (1982); *Gibson v. Berryhill*, 411 U.S. 564, 579, 93 S.Ct. 1689, 1698, 36 L.Ed.2d 488 (1973).

The Ninth Circuit has not addressed this issue since 1962, when in *United States v. Lewis*, 308 F.2d 453 (9th Cir.1962), it held that disqualification of land commissioners were within the discretion of the district court unless "actual bias has been demonstrated beyond reasonable possibility of disagreement." *Id.* at 457. *Lewis* recognized that: "Those qualified to act as commissioners in a particular area are likely

to have had prior association with those qualified as expert witnesses from that area."

In light of the language of Fed.R.Civ.P. 53 and cases such as *Morgan v. Kerrigan*, 530 F.2d 401 (1st Cir.), *cert. denied*, 426 U.S. 935, 96 S.Ct. 2648, 2649, 49 L.Ed.2d 386 (1976); *Rios v. Enterprise Ass'n Steamfitters Local 638*, 860 F.2d 1168 (2d Cir.1988), which all involved district court selection of Special Masters, the Court will amend § 9 of the Implementation Order.

II. Access Across Privately Owned Lands

In the 1994 Decision, the Court rejected application of the *Shively* presumption to the Stevens Treaty. The *Shively* presumption "holds that any pre-statehood grant of property does not include tidelands unless the grant clearly indicated that tidelands were included." *Washington*, 873 F.Supp. at 1443. The Court noted that in previous cases, the Supreme Court had declined to apply the Shively presumption to Indian treaties. *Id.* at 1444 (citing *United States v. Winans*, 198 U.S. 371, 381, 25 S.Ct. 662, 664, 49 L.Ed. 1089 (1905); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 678-80, 99 S.Ct. 3055, 3070-71, 61 L.Ed.2d 823 (1979) (*Fishing Vessel*)). The Court did not hold specifically that the Indian tribes had a right of access across private property, but the rejection of the *Shively* presumption suggested that the right existed.

In the Interim Order, the Court, having been presented with evidence, held that the Indian tribes had no right of access across privately owned tidelands, *unless* they specifically requested permission from the landowner or an Order from the Court. Interim Order, at 2.

Finally, in the Implementation Order, the Court foreclosed all access across private land: "There shall be no upland access to the private tidelands. The Tribes may access the private tidelands by water, across public lands, or by public rights of way only. Nothing in this Plan, however, shall prevent a Private Property Owner from voluntarily agreeing to upland access, although no Tribe has a right to insist on such access

from the Tideland Owner." *Washington*, 898 F.Supp. at 1473, at § 7.2.4.

The Court denied Tribal access across private property for two reasons. First, the evidence at trial showed that the Tribes had reached the tidelands by boat and not by land access. Second, the Court took into account equitable considerations and balanced the Tribes' right to fish against minimizing the intrusion on private property. The Court's ruling sought to avoid the conflict that would be generated by allowing the Tribes to cross privately owned property.

Nevertheless, the Court believes that, upon proper showing of the need for land access, the Tribes would be entitled under Winans to cross private property in order to exercise their fishing rights. Resolving the issue of Tribal access across private property requires the balancing of competing interests, and the Court emphasizes that land access is not to be granted unless there is a proper showing of the need for such.

The Court will modify its Order so as to allow land access to be an issue brought before a Special Master.

III. Minimum Density of Manila Clams

In the Implementation Order, the Court held that "a natural shellfish bed is a bed which is capable of sustaining a yield of shellfish that will support a commercial livelihood." For manila clams, the Court considered the evidence presented at trial and concluded that minimum density was 0.5 pounds per square foot. The Court used the low end of the figures, as there was evidence at trial indicating that the minimum density might be as high as 1.15 pounds per square foot. *Washington*, 898 F.Supp. at 1461.

The Court did not determine the minimum densities for other types of shellfish, leaving that issue for the parties to agree on by consent or to resolve through the Order's dispute resolution mechanism.

The Tribes argue that the Court's ruling concerning the minimum density of clams for commercial harvest is not supported by the evidence, because there is deposition testimony

to the effect that the minimum density might actually be as low as 0.25 or even 0.125 pounds per square foot. (E.g., Depositions of Duane Fagergren, William J. Taylor, David McMillin). The Tribes claim that the data submitted to the Court overinflated the minimum density, because it is based on the density of all clams, rather than mature clams only.

The moving parties do not claim to have newly discovered evidence, nor do they claim that there has been a change in the intervening law or legal error. The Tribes had an opportunity to present counter-evidence and opted not to do so. Based on the record before it, the Court cannot say that the 0.5 pounds per square foot figure will result in manifest unjustness.

Accordingly, the Court DENIES the motion to amend that portion of the Order.

IV. Definition of "Cultivated" Bed

The Court's Implementation Order defines "staked or cultivated" shellfish beds to include all beds that are developed aggressively or passively by the Growers--in other words, artificial beds. Once a bed is determined to be artificial, it retains its artificial character. The significance of this determination is that these artificial beds are exempt from Tribal harvesting. *Washington*, 898 F.Supp. at 1462.

One factor that led the Court to adopt such a broad definition of "cultivated" beds was that "the Court [could not] with any degree of certainty or precision, know what shellfish beds would exist had the Growers never commenced their farming activities." *Id.* A second factor was that the Court did not believe that "the Tribes should benefit from the Grower's efforts." *Id.*

The Tribes complain that this aspect of the Implementation Order is unfair because it restricts them from too much of the Puget Sound shellfish beds. They claim that the Court can determine the state of beds prior to cultivation by the Growers by examining the clam bed surveys conducted by the State of Washington prior to the leases to the Growers.

Since the Tribes are not presenting the Court with new evidence, their only legal basis for altering or amending the judgment is manifest injustice. However, the Tribes have not made any such demonstration in their papers. The entire basis of their claim is that it is possible to determine the pre-cultivation densities.

However, the Court has already considered this argument and rejected it, as stated explicitly in the Implementation Order. The Tribes have not presented sufficient evidence to show that this ruling creates manifest injustice.

Accordingly, the Court DENIES the motion to amend that portion of the Order.

V. Damages Provision

Finally, the Tribes argue that the provision of the Order granting Special Masters the authority to award damages against Tribes violates their sovereign immunity and is thus manifest error in law.

Indian tribes have a broad grant of sovereign immunity--indeed, as broad as that of the United States. *Oklahoma Tax Comm'n v. Potawatomi Indian Tribe*, 498 U.S. 505, 509, 111 S.Ct. 905, 909, 112 L.Ed.2d 1112 (1991); *Rehner v. Rice*, 678 F.2d 1340, 1351 (9th Cir.1982) (en banc). Tribes cannot be sued without their unequivocal consent. *Potawatomi*, 498 U.S. at 509, 111 S.Ct. at 909.[3]

In *Potawatomi*, the issue was whether an Indian tribe that brought suit, seeking injunctive relief against Oklahoma's proposed tax assessment on cigarette sales by the tribe, had waived its sovereign immunity to past taxes owed. The Supreme Court held that the district court properly held that Oklahoma could require the tribe to collect sales taxes on sales to non-Indians in the future, but could not collect such past taxes owed. In other words, the Supreme Court held that by bringing a claim for injunctive relief, the tribe had waived its sovereign

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[3] However, individual tribal members are not protected by tribal sovereign immunity. *Potawatomi*, 498 U.S. at 514, 111 S.Ct. at 911-12 (citing *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908)).

immunity to injunctive relief against it, but not monetary awards for past conduct.

The State of Washington relies on *United States v. Oregon*, 657 F.2d 1009 (9th Cir.1981), to argue for an opposite result. Aside from the fact that *Oregon* is an older case and a level below the Supreme Court, *Oregon* does not stand for the proposition that intervention in a suit by an Indian tribe waives the tribe's sovereign immunity to damages. In *Oregon*, the issue was whether the intervention by the Yakima tribe as a plaintiff in a suit to enforce fishing rights under treaty opened the tribe up to injunctive relief against it. The Ninth Circuit held that the tribe had assumed the risk that its position would not be accepted, and it was bound by the adverse order. *Id.* at 1015. However, *Oregon* does not hold that intervention in a suit for injunctive relief leaves the tribe open to damage awards against it.

Accordingly, the Court amends that portion of the judgment authorizing Special Masters to assess damages against Tribes.

Conclusion

The Court's Implementation Order of August 28, 1995, is HEREBY AMENDED to be superseded in the following relevant parts:

> 7.2.4 No land access to the privately owned tidelands will be permitted. All tribal access must be by boat, public road, or public right-of-way. Thus, Tribal members shall have no right to go upon or cross private property inland of the high water line, unless such access is specifically requested from and granted by a Special Master pursuant to the dispute resolution mechanism set forth in § 9 of this Implementation Order. The Special Master shall not grant access across private property unless the Tribal members can demonstrate the absence of access by boat, public road, or public right-of-way.

. . . . . .

9.1 Selection of a Special Master

The parties shall designate persons ["designees"] to serve as Special Masters. One person shall be designated by each of the following: [a] the Tribes; [b] the State of Washington; [c] the Shellfish Growers; and [d] the Private Property Owners. The four designated persons shall serve as a panel of Special Masters for purposes of this dispute resolution procedure; however, a single Special Master will hear and determine each dispute referred to the panel. The Clerk of the Court shall conduct a random drawing to select the Special Master from the panel for each dispute.

9.1.1 In designating its designee, each group is to provide the name, address, phone number, qualifications, and relevant previous employment and activities to the Court and to the other parties.

9.1.2 No designee shall become a Special Master unless approved by the Court. In the event a designee becomes unable or unwilling to continue service, the party that designated that individual shall designate a replacement within thirty days of the termination of the prior designee's service. Any party may change its designee upon thirty days' notice to the other parties.

9.1.3 Any party may challenge a designee before the Court has approved that person as a Special Master or after having brought a matter for dispute resolution but prior to the selection of a Special Master. The challenge shall be by motion to the Court, and may be on an expedited schedule if the party applies for permission. Challenges shall be made only for actual bias on the part of the Special Master.

. . .

9.2.5 The Special Master shall issue a written report and recommendation stating the decision and the reasons for the decision within ten working days of the

conclusion of the hearing or the submission of evidence by the parties to the dispute, whichever is later, unless agreed otherwise by the parties and the Special Master. In fashioning resolution to a dispute, a Special Master shall have no authority to eliminate the Treaty fishing rights of an entire Tribe or to impose damages against a Tribe. The Special Master may, however, implement some other appropriate injunctive remedy and may assess damages against individual Tribal members who damage private property during the exercise of fishing rights.

. . . . .

9.2.8 The Special Master's report and recommendation shall resolve the dispute when approved and adopted by the Court.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve, by telefax or by United States mail, copies of this Order on counsel for the parties in this matter.

Enabling Act, 25 Stat. 676, 679

AN ACT to provide for the division of Dakota into two States and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State governments and to be admitted into the Union on an equal footing with the original States, and to make donations of public lands to such States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the inhabitants of all that part of the area of the United States now constituting the Territories of Dakota, Montana, and Washington, as at present described, may become the States of North Dakota, South Dakota, Montana, and Washington, respectively, as hereinafter provided.

. . . .

SEC. 8. That the constitutional convention which may assemble in South Dakota shall provide by ordinance for resubmitting the Sioux Falls constitution of eighteen hundred and eight-five, after having amended the same as provided in section five of this act, to the people of South Dakota for ratification or rejection at an election to be held therein on the first Tuesday in October, eighteen hundred and eighty-nine; but if said constitutional convention is authorized and required to form a new constitution for South Dakota it shall provide for submitting the same in like manner to the people of South Dakota for ratification or rejection at an election to be held in said proposed State on the said first Tuesday in October. And the constitutional conventions which may assemble in North Dakota, Montana, and Washington shall provide in like manner for submitting the constitutions formed by them to the people of said proposed States, respectively, for ratification or rejection at elections to be held in said proposed States on the said first Tuesday in October. At the elections provided for in this section

the qualified voters of said proposed States shall vote directly for or against the proposed constitutions, and for or against any articles or propositions separately submitted. The returns of said elections shall be made to the secretary of each of said Territories, who with the governor and chief-justice thereof, or any two of them, shall canvass the same; and if a majority of the legal votes cast shall be for the constitution the governor shall certify the result to the President of the United States, together with a statement of the votes cast thereon and upon separate articles or propositions, and a copy of said constitution, articles, propositions, and ordinances. And if the constitutions and governments of said proposed States are republican in form, and if all the provisions of this act have been complied with in the formation thereof, it shall be the duty of the President of the United States to issue his proclamation announcing the result of the election in each, and thereupon the proposed States which have adopted constitutions and formed State governments as herein provided shall be deemed admitted by Congress into the Union under and by virtue of this act on an equal footing with the original States from and after the date of said proclamation.

Article XV
HARBORS AND TIDE WATERS

§ 1 HARBOR LINE COMMISSION AND RESTRAINT ON DISPOSITION. The legislature shall provide for the appointment of a commission whose duty it shall be to locate and establish harbor lines in the navigable waters of all harbors, estuaries, bays and inlets of this state, wherever such navigable waters lie within or in front of the corporate limits of any city, or within one mile thereof on either side. Any harbor line so located or established may thereafter be changed, relocated or reestablished by the commission pursuant to such provision as may be made therefor by the legislature. The state shall never give, sell or lease to any private person, corporation, or association any rights whatever in the waters beyond such harbor lines, nor shall any of the area lying between any harbor line and the line of ordinary high water, and within not less than fifty feet nor more than two thousand feet of such harbor line (as the commission shall determine) be sold or granted by the state, nor its rights to control the same relinquished, but such area shall be forever reserved for landings, wharves, streets, and other conveniences of navigation and commerce.

§ 2 LEASING AND MAINTENANCE OF WHARVES, DOCKS, ETC. The legislature shall provide general laws for the leasing of the right to build and maintain wharves, docks and other structures, upon the areas mentioned in section one of this article, but no lease shall be made for any term longer than thirty years, or the legislature may provide by general laws for the building and maintaining upon such area wharves, docks, and other structures.

§ 3 EXTENSION OF STREETS OVER TIDE LANDS. Municipal corporations shall have the right to extend their streets over intervening tide lands to and across the area reserved as herein provided.

Article XVII
TIDE LANDS

§ 1 DECLARATION OF STATE OWNERSHIP. The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: *Provided*, that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state.

§ 2 DISCLAIMER OF CERTAIN LANDS. The state of Washington disclaims all title in and claim to all tide, swamp and overflowed lands, patented by the United States: *Provided*, the same is not impeached for fraud.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, et al., Plaintiffs, v. STATE OF WASHINGTON, et al., Defendants.	No. CV 9213 Subproceeding No. 89-3 ORDER DENYING SUMMARY JUDGMENT RE: CERTAIN SPECIES AND DEEP-WATER HARVEST

TO ALL COUNSEL OF RECORD:

The Court has read and considered the papers supporting and opposing the State of Washington's motion for partial summary judgment regarding certain species and deep-water harvest. The Court finds that the two theories advanced by the State of Washington are inconsistent with a proper interpretation of the Stevens Treaty. Accordingly, these theories are rejected, and partial summary judgment is DENIED.

INTRODUCTION

The State of Washington ("Washington") has moved for partial summary judgment to establish that the right of the tribes to harvest shellfish is limited to exclude:

(1) Species that were not harvested at or before treaty time, such as shrimp, scallops, squid or abalone

(2) Shellfish harvested in deep-water areas where no harvesting occurred at or before treaty time, such as sea cucumbers, sea urchins, octopus, goeduck and crab.

Standard for Summary Judgment

Fed. R. Civ. P. 56(c) provides that summary judgment will be granted if the moving party can establish that there is "no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." British Airways Board v. Boeing Co., 585 F.2d 946, 951 (9th Cir. 1978). It is the moving party's burden to inform the Court of the basis for its belief there are no genuine issues of material fact and this may be demonstrated by pointing out an absence of evidence to support the nonmoving party's case. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

Principles of Treaty Interpretation

According to United States v. Choctaw Nation, 179 U.S. 291, 306 (1900), the intentions of the parties to the treaty will control the treaty's interpretation. In determining the intentions, a Court should look to "the words used – the words being interpreted, not literally nor loosely, but according to their ordinary signification. If the words be clear and explicit, leaving no room for doubt what the parties intended, they must be interpreted according to their natural and ordinary significance." Id. (emphasis added).

Therefore, under the familiar cannon [sic] of statutory construction, the starting point for interpreting a statute (in this case a treaty) is the language of the statute itself and "absent a clearly expressed legislative intention to the contrary, . . . [treaty] language must ordinarily be regarded as conclusive." Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980); See also Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 180 (1982) ("Clear import of treaty language controls unless application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent of expectations of its signatories").

Special canons of construction are applied to determine the meaning of Indian treaties. These canons provide that any ambiguities in language must be resolved in favor of the Indians, that the language should not be construed to the prejudice of the Indians, and that technical meanings should be avoided in favor of the understanding of the Indians. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n., 443 U.S. 658, 675-676 (1979); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 528 (1832); Winters v. United States, 207 U.S. 564, 577 (1908); U.S. v. Winans, 198 U.S. 371 (1905). Finally, the Supreme Court stated in United States v. Winans, 198 U.S. 371, 381 (1905) that Indian treaties should not be viewed as grants or rights to the Indians, but as grants of rights from the Indians to the United States. Any rights which were not granted by the

Indians to the United States were reserved by the Indians because the Indians already possessed them.

Washington Theory Number One: Species Limitation

Washington begins with a factual assertion that the Tribes did not harvest certain species of shellfish, such as shrimp and scallops ("named species"), at or before treaty time. On that basis, Washington argues that the Stevens Treaty covers only species of fish harvested at or before treaty time, and that the Tribes therefore have no treaty right respecting the named species.

The starting point in evaluating this theory is the treaty language itself:

> The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. Provided, however, that they shall not take shell-fish from any beds staked or cultivated by citizens.

The Court has already held that shellfish are fish. Since the named species are shellfish, they are fish as well, and are covered by the treaty. There is no language in the treaty that undermines these simple propositions.

Any attempt by Washington to read such a limitation into the treaty must fail. All of the canons or treaty construction obstruct such an inference, but one such canon is particularly

lethal to Washington's theory: the "reservation of rights" canon. It is well-settled that treaties are to construed as a grant from the Indians to the United States, not the reverse, and that any rights specified in the treaty are deemed "reserved" by the Indians. See, e.g. Winans, supra; U.S. v. Washington, 520 F.2d 676, 684 (9th Cir. 1975). Prior to the signing of the Stevens Treaty, the Indians had the absolute right to harvest any species they desired. They had the right to harvest shrimp and scallops; whether or not they exercised that right is irrelevant. The right to fish reserved in the treaty therefore encompasses a right to harvest the named species.

This finding is consistent with the prior findings of this Court. In U.S. v. Washington, 384 F.Supp 312, 401 (W.D. Wash. 1974), Judge Boldt established as a conclusion of law that:

> [t]he right secured by the treaties to the Plaintiff tribes is not limited as to species of fish, the origin of fish, the purpose or use, or the time or manner of taking, except to the extent necessary to achieve preservation of the resource and to allow non-Indians an opportunity to fish in common with treaty right fishermen outside reservation boundaries.

Thus the law of the case as well as the principles of treaty interpretation repudiates the first theory advanced by Washington.

Washington Theory Number Two: Deep-Water Harvest

The second limit on the Tribes' treaty rights sought by Washington relies on the "usual and accustomed grounds and stations" clause in the Stevens Treaty. Washington argues that deep-water areas are excluded as a matter of law from all Tribes' usual and accustomed grounds, because none of the tribes engaged in deep-water harvest at or before treaty time.

Determination of each tribe's usual and accustomed grounds requires a factual inquiry by the Court; each tribe must come forward and prove its usual and accustomed grounds and stations at the time the treaty was signed. However, Washington wishes to pre-empt some portion of this factual determination, and have the Court exclude all deep-water areas from treaty coverage. The Court declines to make such a finding.

As discussed above, prior to the signing of the Stevens Treaty, the Tribes had the absolute right to fish for whatever species they desired within their usual and accustomed grounds. Similarly, they had the absolute right to plumb any depths within those usual and accustomed grounds. Just as it is irrelevant that the Tribes chose not to harvest the named species, it is irrelevant that they could not, because of technological limitations, harvest shellfish in deep-water areas. Had it been availed of the technology, any tribe could have harvested shellfish in the deep waters of their usual and accustomed

grounds, areas where they had previously fished only for anadromous fish.

Consistent with these observations, the Court concludes as a matter of law that usual and accustomed grounds and stations do not vary with the species of fish, and that the usual and accustomed grounds and stations for non-anadromous fish are coextensive with those of anadromous fish. And, as there is ample evidence that at least some of the tribes' usual and accustomed grounds and stations for anadromous fish include deep-water areas, See e.g., United States v. Washington, 384 F.Supp. at 367, 369, 371, 374, the Court will not exclude deep-water areas from any determination of usual and accustomed grounds and stations in this case.

IT IS SO ORDERED.

The Clerk of the Court is directed to send copies of this Order to all counsel of record and others entitled to notice, via United States Mail, immediately.

DATED this 5 day of January, 1994.

EDWARD RAFEEDIE
United States District Judge

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, et al., Plaintiffs, v. STATE OF WASHINGTON, et al., Defendants.	No. CV 9213 Subproceeding No. 89-3 ORDER CLARIFYING PRIOR ORDER DENYING SUMMARY JUDGMENT RE: CERTAIN SPECIES AND DEEP-WATER HARVEST

TO ALL COUNSEL OF RECORD:

On January 6, 1994, the Court issued an order denying summary judgment to defendants regarding the issues of certain species and deep-water harvest. The parties have interpreted the Court's order as a grant of summary judgment in favor of plaintiffs. It was not the Court's intention to bestow this benefit upon the non-moving party. Notwithstanding any language in the order indicating otherwise, it was the Court's intention to reject the interpretation offered by defendants, not to adopt an alternative interpretation as a matter of law. The order was neither a grant of summary judgment, nor a partial adjudication of issues; it was merely a denial of summary judgment. Any language indicating otherwise should be disregarded. The issues raised in the summary judgment motion remain to be resolved at

trial. The plaintiff tribes, all of them, must still come forward with evidence proving usual and accustomed grounds.

IT IS SO ORDERED.

The Clerk of the Court is directed to send copies of this Order to all counsel of record and others entitled to notice, via United States mail, immediately.

DATED this ___ day of January, 1994.

EDWARD RAFEEDIE
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, et al., Plaintiffs, v. STATE OF WASHINGTON, et al., Defendants.	No. CV 9213 ORDER ON REQUESTS FOR DETERMINATION RE HERRING FISHERIES

This matter having come on before the Court on the Request for Determination re Non-Anadromous Fish by defendants Fisheries and Game, and upon the Requests for Determination of Right to Engage in Herring Fisheries filed by the following tribes: Lummi, Swinomish, Suquamish, Port Gamble Band, Squaxin Island, Skokomish, Nisqually, Puyallup and Upper Skagit; and the Court having read and thoroughly considered the memoranda of all parties with respect to these requests and the following reports prepared by Dr. Barbara Lane (in addition to her reports admitted into evidence at trial); "The Indian Herring Fishery From Earliest Times to the Mid-Nineteenth Century"; "Non-Indian Involvement in Herring Fisheries in Western Washington, 1855-1880"; "Supplemental Report on Indian Herring and Herring Roe Fisheries"; and

"Identity, Treaty Status and Fisheries of the Suquamish Tribe of the Port Madison Reservation"; the Court hereby makes the following determinations:

1. The subject matter of the original trial in this action was limited to off-reservation treaty Indian fishing rights in the case area and the application of said rights to anadromous fish resources. (See FPTO §5 and C.ofL. #7).

2. The Court has, however, expressly retained continuing jurisdiction to assure implementation of the Court's rulings and to deal with environmental issues and other relevant matters. (See 384 F.Supp. at 347, and C.ofL. #48). The fact that Final Decision #I and related orders are on appeal does not divest this Court of jurisdiction to deal with matters not a part of the judgment appealed no related directly to those previous rulings. (See Bullock v. Director of Patuxent Institution, 190 A.2d 789 (Md. 1963). For example, issues relating to fishing outside of the case area, on-reservation fishing, or non-anadromous fishing are clearly within the subject matter jurisdiction of this Federal District Court, (see F.ofF. #11 and C.ofL. #21) so that litigation with respect to such issues could clearly be brought before this Court in separate actions; however, equity favors prevention of a multiplicity of actions, Camp v. Boyd, 229 U.S. 530 (1913), and in the opinion of this Court, proper exercise of its jurisdiction permits, and efficient administration of justice requires, this Court to deal with matters

related to, but not included within, Final Decision #I such as possible treaty right non-anadromous fishing.

3. On the present record it is not necessary, nor have the parties requested, that the Court make broad or final determinations with respect to non-anadromous fishing. The sole issue before the Court at this time is the possible treaty entitlement of certain tribal applicants to participate in fisheries for non-anadromous herring and/or herring roe. Pursuant to paragraph G. 1. of the Order for Program to Implement Interim Plan, the nine tribes listed above have requested that the Court make a preliminary determination as to their entitlement to participate in such herring fisheries, and have submitted evidence consisting primarily of the anthropological reports of Dr. Barbara Lane to support their claims of such treaty entitlement. Based upon the evidence submitted, the Court finds that prima facie showings of treaty entitlement have been made by the following tribes: Lummi, Swinomish, Suquamish, Skokomish, Port Gamble, Puyallup and Nisqually, and that therefore such tribes shall be entitled to conduct off-reservation herring fisheries subject to the provision s set forth in paragraph 5 below, which herring fisheries may be conducted at each tribe's usual and accustomed fishing places as set forth in the Findings of Fact for each respective tribe; except that with respect to the Swinomish Indian Tribal Community and the Suquamish Tribe, for which no usual and accustomed places

have been found by the Court, those tribes shall be entitled to conduct herring fisheries at their claimed usual and accustomed fishing places, subject to the state's authority to contest any such location consistent with the prior judgment and orders of this Court, and subject to resolution of the dispute between the Lummi and Swinomish Tribes concerning fishing locations.

4. The Court finds that the Squaxin Island Tribe and Upper Skagit Tribe have not established a prima facie showing of treaty entitlement to participate in non-anadromous herring fishery, but that further opportunity to present evidence as to such entitlement shall be provided to these two tribes and any other applicant at the hearing to be held pursuant to paragraph 6 below.

5. Those tribes authorized to conduct non-anadromous herring fisheries shall filed with the Court and serve upon defendant Department of Fisheries, not later than April 2, 1975, tribal regulations concerning such fisheries, which shall include, inter alia, the following information: Whether fisheries will be conducted for herring, or herring roe, or both; proposed opening date, specific hours and days of the week of the fishery, and the locations at which said fishery will be conducted, whether for herring or herring roe. All tribes authorized to conduct herring fisheries and the defendant Department of Fisheries are directed to contact Dr. Whitney for the purpose of arranging one or more meetings prior to April 9, 1975 to confer and attempt to resolve

differences concerning the following matters: Opening dates for tribal herring fisheries; possible uniform closed periods for treaty and non-treaty herring fisheries; "Principles of Management for Herring" and other appropriate procedures to insure necessary spawning escapement and conservation of the herring stocks; possible questions as to usual and accustomed fishing locations; possible questions concerning sufficiency of tribal regulations; and other relevant matters.

6. A hearing will be held with respect to treaty herring fisheries on Wednesday, April 9, 1975 at 9:30 a.m. to receive further anthropological or biological testimony as may be necessary to deal with the matters referred to above and to hear oral argument from counsel with respect to herring fishery issues remaining unresolved at that time.

IT IS SO ORDERED this 28th day of March, 1975.

GEORGE H. BOLDT
Sr. United States District Judge

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10 Stat. 1132

TREATY WITH NISQUALLYS, &c. Dec 26, 1854

FRANKLIN PIERCE

PRESIDENT OF THE UNITED STATES OF AMERICA

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS a treaty was made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, on the twenty-sixth day of December, one thousand eight hundred and fifty-four, between the United States of America and the Nisqually and other bands of Indians, which treaty is in the words following, to wit:--

Articles of agreement and convention made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, this twenty-sixth day of December, in the year one thousand eight hundred and fifty-four, by Isaac I. Stevens, governor and superintendent of Indians affairs of the said Territory, on the part of the United States, and the undersigned chiefs, head-men, and delegates of the Nisqually, Puyallup, Steilacoom, Squawskin, S'Homamish, Stehchass, T'Peek-sin, Squi-aitl, and Sa-heh-wamish tribes and bands of Indians, occupying the lands lying round the head of Puget's Sound and the adjacent inlets, who, for the purpose of this treaty, are to be regarded as one nation, on behalf of said tribes and bands, and duly authorized by them.

ARTICLE I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United Sates, all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows, to wit: Commencing at the point on the eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott Bays; thence running in a southeasterly direction, following the divide between the waters of the Puyallup and Dwamish, or White Rivers, to the summit of the Cascade Mountains; thence southerly, along the summit of said range, to a point opposite the main source of the Skookum Chuck Creek; thence to and down said creek, to the coal mine; thence

northwesterly, to the summit of the Black Hills; thence northerly, to the upper forks of the Satsop River; thence northeasterly, through the portage known as Wilkes's Portage, to Point Southworth, on the western side of Admiralty Inlet; thence around the foot of Vashon's Island, easterly and southeasterly, to the place of beginning.

ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands, the following tracts of land, vis: The small island called Klah-che-min, situated opposite the mouths of Hammersley's and Totten's Inlets, and separated from Hartstene Island by Peale's Passage, containing about two sections of land by estimation; a square tract containing two sections, or twelve hundred and eighty acres, on Puget's Sound, near the mouth of the She-nah-nam Creek, one mile west of the meridian line of the United States land survey, and a square tract containing two sections, or twelve hundred and eighty acres, lying on the south side of Commencement Bay; all which tracts shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the tribe and the superintendent or agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the mean time, it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience, roads may be run through their reserves, and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them.

ARTICLE III. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.

ARTICLE IV. In consideration of the above session, the United States agree to pay to the said tribes and bands the sum of thirty-two thousand five hundred dollars, in the following manner, that is to say: For the first year after the ratification hereof, three thousand two hundred and fifty dollars; for the next two years, three thousand dollars each year; for the next three years, two thousand dollars each year; for the next four years fifteen hundred dollars each year; for the next five years twelve hundred dollars each year; and for the next five years one thousand dollars each year; all which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

ARTICLE V. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of three thousand two hundred and fifty dollars, to be laid out and expended under the direction of the President and in such manner as he shall approve.

ARTICLE VI. The President may hereafter, when in his opinion the interests of the Territory may require, and the welfare of the said Indians be promoted, remove them from either or all of said reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands. And he may further, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indians, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment be made accordingly therefor.

ARTICLE VII. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

ARTICLE VIII. The aforesaid tribes and bands acknowledge their dependence on the Government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations on the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and other Indians to the Government of the United States, or its agent, for decision, and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article, in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the Untied States, but to deliver them up to the authorities for trial.

ARTICLE IX. The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same; and therefore it is provided, that any Indian belonging to said tribes, who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE X. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support, for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands, in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer, for the term of twenty years, to instruct the Indians in their respective occupations. And the United States further agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of the said school, shops, employees, and medical attendance, to be defrayed by the United States, and not deducted from the annuities.

ARTICLE XI. The said tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter.

ARTICLE XII. The said tribes and bands finally agree not to trade at Vancouver's Island, or elsewhere out of the dominions of the United States; nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

ARTICLE XIII. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian Affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands, have hereunto set their hands and seals at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS, [L.S.]
Governor and Superintendent Territory of Washington.

QUI-EE-METL,	his x mark.[L.S.]
SNO-HO-DUMSET,	his x mark.[L.S.]
LESH-HIGH,	his x mark.[L.S.]
SLIP-O-LEM,	his x mark.[L.S.]
KWI-ATS,	his x mark.[L.S.]
STEE-HIGH,	his x mark.[L.S.]
DI-A-KEH,	his x mark.[L.S.]
HI-TEN,	his x mark.[L.S.]
SQUA-TA-HUN,	his x mark.[L.S.]
KAHK-TSE-MIN,	his x mark.[L.S.]
SONAN-O-YUTL,	his x mark.[L.S.]
KL-TEHP,	his x mark.[L.S.]
SAHL-KO-MIN,	his x mark.[L.S.]
T'BET-STE-HEH-BIT,	his x mark.[L.S.]
TCHA-HOOS-TAN,	his x mark.[L.S.]
KE-CHA-HAT,	his x mark.[L.S.]
SPEE-PEH,	his x mark.[L.S.]
SWE-YAH-TUM,	his x mark.[L.S.]
CHA-ACHSH,	his x mark.[L.S.]
PICH-KEHD,	his x mark.[L.S.]
S'KLAH-O-SUM,	his x mark.[L.S.]

SAH-LE-TATL,	his x mark.[L.S.]
SEE-LUP,	his x mark.[L.S.]
E-LA-KAH-KA,	his x mark.[L.S.]
SLUG-YEH,	his x mark.[L.S.]
HI-NUK,	his x mark.[L.S.]
MA-MO-NISH,	his x mark.[L.S.]
CHEELS,	his x mark.[L.S.]
KNUTCANU,	his x mark.[L.S.]
BATS-TA-KOBE,	his x mark.[L.S.]
WIN-NE-YA,	his x mark.[L.S.]
KLO-OUT,	his x mark.[L.S.]
SE-UCH-KA-NAM,	his x mark.[L.S.]
SKE-MAH-HAN,	his x mark.[L.S.]
WUTS-UN-A-PUM,	his x mark.[L.S.]
QUUTS-A-TADM,	his x mark.[L.S.]
QUUT-A-HEH-MTSN,	his x mark.[L.S.]
YAH-LEH-CHN,	his x mark.[L.S.]
TO-LAHL-KUT,	his x mark.[L.S.]
YUL-LOUT,	his x mark.[L.S.]
SEE-AHTS-OOT-SOOT,	his x mark.[L.S.]
YE-TAKHO,	his x mark.[L.S.]
WE-PO-IT-EE,	his x mark.[L.S.]
KAH-SLD,	his x mark.[L.S.]
LA'H-HOM-KAN,	his x mark.[L.S.]
PAH-HOW-AT-ISH,	his x mark.[L.S.]
SWE-YEHM,	his x mark.[L.S.]
SAH-HWILL,	his x mark.[L.S.]
SE-KWAHT,	his x mark.[L.S.]
KAH-HUM-KLT,	his x mark.[L.S.]
YAH-KWO-BAH,	his x mark.[L.S.]
WUT-SAH-LE-WUN,	his x mark.[L.S.]
SAH-BA-HAT,	his x mark.[L.S.]
TEL-E-KISH,	his x mark.[L.S.]
SWE-KEH-NAM,	his x mark.[L.S.]
SIT-OO-OAH,	his x mark.[L.S.]
KO-QUEL-A-CUT,	his x mark.[L.S.]
JACK,	his x mark.[L.S.]
KEH-KISE-BEL-LO,	his x mark.[L.S.]
GO-YEH-HN,	his x mark.[L.S.]
SAH-PUTSH,	his x mark.[L.S.]
WILLIAM,	his x mark.[L.S.]

Executed in the presence of us:--

M. T. SIMMONS, *Indian agent.*
JAMES DOTY, *Secretary of the Commission.*
C. H. MASON, *Secretary Washington Territory.*
W. A. SLAUGHTER, *1st Lieut. 4th Infantry.*
JAMES McALISTER,
E. GIDDINGS, jr.,
GEORGE SHAZER,
HENRY D. COCK,
S. S. FORD, jr.,
JOHN W. McALISTER
CLOVINGTON CUSHMAN,
PETER ANDERSON,
SAMUEL KLADY,
W. H. PULLEN,
P. O. HOUGH,
E. R. TYERALL,
GEORGE GIBBS,
BENJ. F. SHAW, *Interpreter*,
HAZARD STEVENS.

And whereas the said treaty having been submitted to the Senate of the United States, for its constitutional action thereon, the Senate did, on the third day of March, one thousand eight hundred and fifty-five, advise and consent to the ratification of its articles by a resolution in the words and figures following, to wit:—

"IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES,

"March 3, 1855.

"*Resolved*, (two-thirds of the senators present concurring,) That the Senate advise and consent to the ratification of the articles of agreement and convention made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, this twenty-sixth day of December, in the year one thousand eight hundred and fifty-four, by Isaac I. Stevens, governor and superintendent of Indian affairs of the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates or the Nisqually, Puyallup, Steilacoom, Squawksin, S'Hom-amish, Steth-chass, T'Peeksin, Squi-aitl, and Sa-heh-wamish tribes and bands of

Indians occupying the lands lying round the head of Puget's Sound and the adjacent inlets, who, for the purpose of this treaty, are to be regarded as one nation, on behalf of said tribes and bands, and duly authorized by them.

"Attest: ASBURY DICKINS,
"*Secretary.*"

Now, therefore, be it known that I, FRANKLIN PIERCE, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the third of March, one thousand eight hundred and fifty-five, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be hereto affixed, and have signed the same with my hand.

Done at the city of Washington, this tenth day of April, in the year of our Lord one thousand eight hundred and fifty-five, and of the independence of the United States the seventy-ninth.

FRANKLIN PIERCE.

By the President:
W. L. MARCY, *Secretary of State.*

12 Stat. 927

TREATY WITH THE DWAMISH & c.* INDIANS.
Jan. 22, 1855

Treaty between the United States and the Dwámish, Suquámish, and other allied and subordinate Tribes of Indians in Washington Territory. Concluded at Point Elliott, Washington Territory, January 22, 1855. Ratified by the Senate, March 8, 1859. Proclaimed by the President of the United States, April 11, 1859.

JAMES BUCHANAN

PRESIDENT OF THE UNITED STATES

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS a Treaty was made and concluded at Múckl-te-óh, or Point Elliott, in the Territory of Washington, the twenty-second day of January, one thousand eight hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the hereinafter-named chiefs, headmen, and delegates of the Dwámish, Suquámish, Sk-táhl-mish, Sam-áhmish, Smalh- kamish, Skope-áhmish, St-káh-mish, Snoquálmoo, Skai-wha-mish, N'Quentl-má-mish, Sk-táh-le-jum, Stoluck-whá-mish, Sno-ho-mish, Skágit, Kik-i-állus, Swin-á-mish, Squin-áh-mish, Sah-ku-méhu, Noo-whá-há, Nook-wa-cháh-mish, Mee-see-qua-guilch, Cho-bah- áh-bish, and other allied and subordinate tribes and bands of Indians occupying certain lands situated in said Territory of Washington, on behalf of said tribes and duly authorized by them; which treaty is in the words and figures following to wit:

Articles of agreement and convention made and concluded at Múckl-te-óh, or Point Elliott, in the Territory of Washington, this twenty-second day of January, eighteen hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the undersigned chiefs, headmen and delegates of the Dwámish, Suquámish, Sk-táhl-mish,

Sam-áhmish, Smalh-kamish, Skope-áhmish, St-káh- mish, Snoquálmoo, Skai-wha-mish, N'Quentl-má-mish, Sk-táh-le-jum, Stoluck-whá-mish, Sno-ho-mish, Skágit, Kik-i-állus, Swin-á- mish, Squin-áh-mish, Sah-ku-méhu, Noo-whá-há, Nook-wa-cháh- mish, Mee-sée-qua-guilch, Cho-bah-áh-bish, and other allied and subordinate tribes and bands of Indians occupying certain lands situated in said Territory of Washington, on behalf of said tribes, and duly authorized by them.

ARTICLE I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows: Commencing at a point on the eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott Bays; thence eastwardly, running along the north line of lands heretofore ceded to the United States by the Nisqually, Puyallup, and other Indians, to the summit of the Cascade range of mountains; thence northwardly, following the summit of said range to the 49th parallel of north latitude; thence west, along said parallel to the middle of the Gulf of Georgia; thence through the middle of said gulf and the main channel through the Canal de Arro to the Straits of Fuca, and crossing the same through the middle of Admiralty Inlet to Suquamish Head; thence southwesterly, through the peninsula, and following the divide between Hood's Canal and Admiralty Inlet to the portage known as Wilkes' Portage; thence northeastwardly, and following the line of lands heretofore ceded as aforesaid to Point Southworth, on the western side of Admiralty Inlet, and thence round the foot of Vashon's Island eastwardly and southeastwardly to the place of beginning, including all the islands comprised within said boundaries, and all the right, title, and interest of the said tribes and bands to any lands within the territory of the United States.

ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes an bands the following tracts of land, viz: the amount of two sections, or twelve hundred and eighty acres, surrounding the small bight at the head of Port Madison, called by the Indians Noo-sohk-um; the amount of two sections, or twelve hundred and eighty acres, on the north side Hwhomish Bay and the creek emptying into the same called Kwilt-seh-da, the peninsula at the southeastern end of Perry's Island, called Sháis-quihl, and the island called Chah-choo-sen, situated in the Lummi River at the point of

separation of the mouths emptying respectively into Bellingham Bay and the Gulf of George. All which tracts shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribes or bands, and of the superintendent or agent, but, if necessary for the public convenience, roads may be run through the said reserves, the Indians being compensated for any damage thereby done them.

ARTICLE III. There is also reserved from out the lands hereby ceded the amount of thirty-six sections, or one township of land, on the northeastern shore of Port Gardner, and north of the mouth of Snohomish River, including Tulalip Bay and the before-mentioned Kwilt-seh-da Creek, for the purpose of establishing thereon an agricultural and industrial school, as hereinafter mentioned and agreed, and with a view of ultimately drawing thereto and settling thereon all the Indians living west of the Cascade Mountains in said Territory. *Provided, however*, That the President may establish the central agency and general reservation at such other point as he may deem for the benefit of the Indians.

ARTICLE IV. The said tribes and bands agree to remove to and settle upon the said first above-mentioned reservations within one year after the ratification of this treaty, or sooner, if the means are furnished them. In the mean time it shall be lawful for them to reside upon any land not in the actual claim and occupation of citizens of the United States, and upon any land claimed or occupied, if with the permission of the owner.

ARTICLE V. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. *Provided, however*, that they shall not take shell-fish from any beds staked or cultivated by citizens.

ARTICLE VI. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of one hundred and fifty thousand dollars, in the following manner—that is to say: For the first year after the ratification

hereof, fifteen thousand dollars; for the next two years, twelve thousand dollars each year; for the next three years, ten thousand dollars each year; for the next four years, seven thousand five hundred dollars each years; for the next five years, six thousand dollars each year; and for the last five years, four thousand two hundred and fifty dollars each year. All which said sums of money shall be applied to the use and benefit of the said Indians under the direction of the President of the United States, who may from time to time determine at his discretion upon what beneficial objects to expend the same; and the Superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

ARTICLE VII. The President may hereafter, when in his opinion the interests of the Territory shall require and the welfare of the said Indians be promoted, remove them from either or all of the special reservations hereinbefore made to the said general reservation, or such other suitable place within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of such removal, or may consolidate them with other friendly tribes or bands; and he may further at his discretion cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President and payment made accordingly therefor.

ARTICLE VIII. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

ARTICLE IX. The said tribes and bands acknowledge their dependence on the government of the United States, and promise to be friendly with all citizens thereof, and they pledge themselves to commit no depredations on the property of such citizens. Should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on

any other tribe except in self-defence, but will submit all matters of difference between them and the other Indians to the government of the United States or its agent for decision, and abide thereby. And if any of the said Indians commit depredations on other Indians within the Territory the same rule shall prevail as that prescribed in this article in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE X. The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided that any Indian belonging to said tribe who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE XI. The said tribes and bands agree to free all slaves now held by them and not to purchase or acquire others hereafter.

ARTICLE XII. The said tribes and bands further agree not to trade at Vancouver's Island or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

ARTICLE XIII. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of fifteen thousand dollars to be laid out and expended under the direction of the President and in such manner as he shall approve.

ARTICLE XIV. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer for the like term of twenty years to instruct the Indians in their respective occupations. And the United States finally agree to

employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of said school, shops, persons employed, and medical attendance to be defrayed by the United States, and not deducted from the annuities.

ARTICLE XV. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands of Indians have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS, *Governor and Superintendent.* [L.S.]
SEATTLE, *Chief of the Dwamish and Suquamish tribes.*
his x mark. [L.S.]
PAT-KA-NAM, *Chief of the Snoqualmoo, Snohomish and other tribes.* his x mark. [L.S.]
CHOW-ITS-HOOT, *Chief of the Lummi and other tribes.*
his x mark. [L.S.]
GOLIAH, *Chief of the Skagits and other allied tribes.*
his x mark. [L.S.]
KWALLATTUM, or General Pierce, *Sub-chief of the Skagit tribe.* his x mark. [L.S.]
S'HOOTST-HOOT, *Sub-chief of Snohomish.* his x mark. [L.S.]
SNAH-TALC, or Bonaparte, *Sub-chief of Snohomish.*
his x mark. [L.S.]
SQUUSH-UM, or The Smoke, *Sub-chief of the Snoqualmoo.*
his x mark. [L.S.]
SEE-ALLA-PA-HAN, or The Priest, *Sub-chief of Sk-tah-le-jum.*
his x mark. [L.S.]
HE-UCH-KA-NAM, or George Bonaparte, *Sub-chief of Snohomish.* his x mark. [L.S.]
TSE-NAH-TALC, or Joseph Bonaparte, *Sub-chief of Snohomish.*
his x mark. [L.S.]
NS'SKI-OOS, or Jackson, *Sub-chief of Snohomish.*
his x mark. [L.S.]
WATS-KA-LAH-TCHIE, or John Hobtst-hoot, *Sub-chief of Snohomish.* his x mark. [L.S.]

SMEH-MAI-HU, *Sub-chief of Skai-wha-mish.*
his x mark. [L.S.]

SLAT-EAH-KA-NAM, *Sub-chief of Snoqualmoo.*
his x mark. [L.S.]

ST'HAU-AI, *Sub-chief of Snoqualmoo.* his x mark. [L.S.]

LUGS-KEN, *Sub-chief of Skai-wha-mish.* his x mark. [L.S.]

S'HEHT-SOOLT, or Peter, *Sub-chief of Snohomish.*
his x mark. [L.S.]

DO-QUEH-OO-SATL, *Snoqualmoo tribe.* his x mark. [L.S.]

JOHN KANAM, *Snoqualmoo sub-chief.* his x mark. [L.S.]

KLEMSH-KA-NAM, *Snoqualmoo.* his x mark. [L.S.]

TS'HUAHNTL, *Dwa-mish sub-chief.* his x mark. [L.S.]

KWUSS-KA-NAM, or George Snatelum, Sen., *Skagit tribe.*
his x mark. [L.S.]

HEL-MITS, or George Snatelum, *Skagit sub-chief.*
his x mark. [L.S.]

S'KWAI-KWI, *Skagit tribe, sub-chief.* his x mark. [L.S.]

SEH-LEK-QU, *Sub-chief Lummi tribe.* his x mark. [L.S.]

S'H'-CHEH-OOS, or General Washington, *Sub-chief of Lummi tribe.* his x mark. [L.S.]

WHAI-LAN-HU, or Davy Crockett, *Sub-chief of Lummi tribe.*
his x mark. [L.S.]

SHE-AH-DELT-HU, *Sub-chief of Lummi tribe.*
his x mark. [L.S.]

KWULT-SEH, *Sub-chief of Lummi tribe.* his x mark. [L.S.]

KWULL-ET-HU, *Lummi tribe.* his x mark. [L.S.]

KLEH-KENT-SOOT, *Skagit tribe.* his x mark. [L.S.]

SOHN-HEH-OVS, *Skagit tribe.* his x mark. [L.S.]

S'DEH-AP-KAN, or General Warren, *Skagit tribe.*
his x mark. [L.S.]

CHUL-WHIL-TAN, *Sub-chief of Suquamish tribe.*
his x mark. [L.S.]

SKE-EH-TUM, *Skagit tribe.* his x mark. [L.S.]

PATCHKANAM, or Dome, *Skagit tribe.* his x mark. [L.S.]

SATS-KANAM, *Squin-ah-nush tribe.* his x mark. [L.S.]

SD-ZO-MAHTL, *Kik-ial-lus band.* his x mark. [L.S.]

DAHTL-DE-MIN, *Sub-chief of Sah-ku-meh-hu.*
his x mark. [L.S.]

SD'ZEK-DU-NUM, *Me-sek-wi-guilse sub-chief*
his x mark. [L.S.]

NOW-A-CHAIS, *Sub-chief of Dwamish.* his x mark. [L.S.]

MIS-LO-TCHE, or Wah-hehl-tchoo, *Sub-chief of Suquamish.*
his x mark. [L.S.]

SLOO-NOKSH-TAN, or Jim, *Suquamish tribe.*
his x mark. [L.S.]

MOO-WHAH-LAD-HU, or Jack, *Suquamish tribe.*
his x mark. [L.S.]

TOO-LEH-PLAN, *Suquamish tribe.* his x mark. [L.S.]

HA-SEH-DOO-AN, or Keo-kuck, *Dwamish tribe.*
his x mark. [L.S.]

HOOVILT-MEH-TUM, *Sub-chief of Suquamish.*
his x mark. [L.S.]

WE-AI-PAH, *Skaiwhamish tribe.* his x mark. [L.S.]

S'AH-AN-HU, or Hallam, *Snohomish tribe.* his x mark. [L.S.]

SHE-HOPE, or General Pierce, *Skagit tribe.* his x mark. [L.S.]

HWN-LAH-LAKQ, or Thomas Jefferson, *Lummi tribe.*
his x mark. [L.S.]

CHT-SIMPT, *Lummi tribe.* his x mark. [L.S.]

TSE-SUM-TEN, *Lummi tribe.* his x mark. [L.S.]

KLT-HAHL-TEN, *Lummi tribe.* his x mark. [L.S.]

KUT-TA-KANAM, or John, *Lummi tribe.* his x mark. [L.S.]

CH-LAH-BEN, *Noo-qua-cha-mish band.* his x mark. [L.S.]

NOO-HEH-OOS, *Snoqualmoo tribe.* his x mark. [L.S.]

HWEH-UK, *Snoqualmoo tribe.* his x mark. [L.S.]

PEH-NUS, *Skai-whamish tribe.* his x mark. [L.S.]

YIM-KA-NAM, *Snoqualmoo tribe.* his x mark. [L.S.]

TWOOI-AS-KUT, *Skaiwhamish tribe.* his x mark. [L.S.]

LUCH-AL-KANAM, *Snoqualmoo tribe.* his x mark. [L.S.]

S'HOOT-KANAM, *Snoqualmoo tribe.* his x mark. [L.S.]

SME-A-KANAM, *Snoqualmoo tribe.* his x mark. [L.S.]

SAD-ZIS-KEH, *Snoqualmoo.* his x mark. [L.S.]

HEH-MAHL, *Skaiwhamish band.* his x mark. [L.S.]

CHARLEY, *Skagit tribe.* his x mark. [L.S.]

SAMPSON, *Skagit tribe.* his x mark. [L.S.]

JOHN TAYLOR, *Snohomish tribe.* his x mark. [L.S.]

HATCH-KWENTUM, *Skagit tribe.* his x mark. [L.S.]

YO-I-KUM, *Skagit tribe.* his x mark. [L.S.]

T'KWA-MA-HAN, *Skagit tribe.* his x mark. [L.S.]

STO-DUM-KAN, *Swinamish band.* his x mark. [L.S.]

BE-LOLE, *Swinamish band.* his x mark. [L.S.]

D'ZO-LOLE-GWAM-HU, *Skagit tribe.* his x mark. [L.S.]

STEH-SHAIL, William, *Skaiwhamish band.*	his x mark.	[L.S.]
KEL-KAHL-TSOOT, *Swinamish tribe.*	his x mark.	[L.S.]
PAT-SEN, *Skagit tribe.*	his x mark.	[L.S.]
PAT-TEH-US, *Noo-wha-ah sub-chief.*	his x mark.	[L.S.]
S'HOOLK-KA-NAM, *Lummi sub-chief.*	his x mark.	[L.S.]
CH-LOK-SUTS, *Lummi sub-chief.*	his x mark.	[L.S.]

Executed in the presence of us:—

M. T. SIMMONS, *Indian agent.*
C. H. MASON, *Secretary of Washington Territory.*
BENJ. F. SHAW, *Interpreter.*
CHAS. M. HITCHCOCK.
H. A. GOLDSBOROUGH.
GEORGE GIBBS.
JOHN H. SCRANTON.
HENRY D. COCK.
S. S. FORD, Jr.
ORRINGTON CUSHMAN.
ELLIS BARNES.
R. S. BAILEY.
S. M. COLLINS.
LAFAYETEE BALCH.
E. S. FOWLER.
J. H. HALL.
ROB'T DAVIS.

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the eighth day of March, one thousand eight hundred and fifty-nine, advise and consent to the ratification of its articles by a resolution in the words and figures following, to wit:

"IN EXECUTIVE SESSION,
"SENATE OF THE UNITED STATES, March 8, 1859.

"*Resolved*, (two-thirds of the senators present concurring,) That the Senate advise and consent to the ratification of treaty between the United States and the chiefs, headmen and delegates of the Dwámish, Suquámish and other allied and subordinate tribes of Indians occupying certain lands situated in Washington Territory, signed the 22d day of January, 1855.

"Attest: "ASBURY DICKINS, *Secretary.*"

Now, therefore, be it known that I, JAMES BUCHANAN, President of the United States of America, do, in pursuance of the advise and consent of the Senate, as expressed in their resolution of the eighth of March, one thousand eight hundred and fifty-nine, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be hereto affixed, and have signed the same with my hand.

Done at the city of Washington, this eleventh day of April, in the year of our Lord one thousand eight hundred and fifty-nine, and of the independence of the United States the eighty-third.

JAMES BUCHANAN.

By the President:
LEWIS CASS, *Secretary of State.*

TREATY WITH THE S'KLALLAMS. January 26, 1855.

12 Stat. 933

Treaty between the United States of America and the S'Klallams Indians. Concluded at Point no Point, Washington Territory, January 26, 1855; Ratified by the Senate, March 8, 1859; Proclaimed by the President of the United States, April 18, 1859.

JAMES BUCHANAN,

PRESIDENT OF THE UNITED STATES OF AMERICA,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS, a treaty was made and concluded at Hahd Skus, or Point no Point, in Washington Territory, on the twenty-sixth day of January, eighteen hundred and fifty-five, between Isaac I. Stevens, governor, and Superintendent of Indian Affairs for the said Territory, on the part of the United States, and the hereinafter named Chiefs, Headmen and Delegates of the different villages of the S'Klallams Indians, viz.: the Kah-tai, Squah-quaihtl, Tch-queen, Ste-tehtlum, Tsohkw, Yennis, El-hwa, Pishst, Hunnint, Klat-la-wash, and Oke-no, and also of the Sko-ko-mish, Too-an-hooch, and Chem-a-kum tribes occupying certain lands on the straits of Fuca and Hood's Canal, in the Territory of Washington, on behalf of said tribes, and duly authorized by them; which treaty is in the words and figures following, to wit:

Articles of agreement and convention made and concluded at Hahd-skus, or Point no Point, Suquamish Head, in the Territory of Washington, this twenty-sixth day of January, eighteen hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the different villages of the S'Klallams, viz.: Kah-tai, Squah-quaihtl, Tch-queen, Ste-tehtlum, Tsohkw, Yennis, Elh-wa, Pishtst, Hunnint, Klat-la-wash, and Oke-ho, and also of the Sko-ko-mish, To-an-hooch, and Chem-a-kum tribes, occupying certain lands on the Straits of Fuca and Hood's Canal,

in the Territory of Washington, on behalf of said tribes, and duly authorized by them.

ARTICLE I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows, viz.: Commencing at the mouth of the Okeho River, on the Straits of Fuca; thence southeastwardly along the westerly line of territory claimed by the Makah tribe of Indians to the summit of the Cascade Range; thence still southeastwardly and southerly along said summit to the head of the west branch of the Satsop River, down that branch to the main fork; thence eastwardly and following the line of lands heretofore ceded to the the United States by the Nisqually and other tribes and bands of Indians, to the summit of the Black Hills, and northeastwardly to the portage known as Wilkes' Portage; thence northeastwardly, and following the line of lands heretofore ceded to the United States by the Dwamish, Suquamish, and other tribes and bands of Indians, to Suquamish Head; thence northerly through Admiralty Inlet to the Straits of Fuca; thence westwardly through said straits to the place of beginning; including all the right, title, and interest of the said tribes and bands to any land in the Territory of Washington.

ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands the following tract of land, viz.: the amount of six sections, or three thousand eight hundred and forty acres, situated at the head of Hood's Canal, to be hereafter set apart, and so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribes and bands, and of the superintendent or agent; but, if necessary for the public convenience, roads may be run through the said reservation, the Indians being compensated for any damage thereby done them. It is, however, understood that should the President of the United States hereafter see fit to place upon the said reservation any other friendly tribe or band, to occupy the same in common with those above mentioned, he shall be at liberty to do so.

ARTICLE III. The said tribes and bands agree to remove to and settle upon the said reservation within one year after the ratification of this treaty, or sooner if the means are funished them. In the mean time, it shall be lawful for them to reside upon any lands not in the actual claim or occupation of

citizens of the United States, and upon any land claimed or occupied, if with the permission of the owner.

ARTICLE IV. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States; and of erecting temporary houses for the purpose of curing; together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. *Provided, however,* That they shall not take shell-fish from any beds staked or cultivated by citizens.

ARTICLE V. In consideration of the above cession the United States agree to pay to the said tribes and bands the sum of sixty thousand dollars, in the following manner, that is to say: during the first year after the ratification hereof, six thousand dollars; for the next two years, five thousand dollars each year; for the next three years, four thousand dollars each year; for the next four years, three thousand dollars each year; for the next five years, two thousand four hundred dollars each year; and for the next five years, one thousand six hundred dollars each year. All which said sums of money shall be applied to the use and benefit of the said Indians under the direction of the President of the United States, who may from time to time determine at his discretion upon what beneficial objects to expend the same. And the superintendent of Indians affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

ARTICLE VI. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of six thousand dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

ARTICLE VII. The President may hereafter, when in his opinion the interests of the Territory shall require, and the welfare of said Indians be promoted, remove them from said reservation to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal; or may consolidate them with other friendly tribes or bands. And he may further, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other lands as may be selected in lieu thereof, to be surveyed into lots, and assign the

same to such individuals or families as are willing to avail themselves of the privilege, and will locate thereon as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indians, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment made therefor accordingly.

ARTICLE VIII. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

ARTICLE IX. The said tribes and bands acknowledged their dependence on the Government of the United States, and promise to be friendly with all citizens thereof; and they pledge themselves to commit no depredations on the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities. Nor will they make war on any other tribe, except in self-defence, but will submit all matters of difference between them and other Indians to the Government of the United States, or its agent, for decision, and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the United States, but to deliver them up for trial by the authorities.

ARTICLE X. The above tribes and bands are desirous to exclude from their reservation the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided that any Indian belonging thereto who shall be guilty of bringing liquor into said reservation or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE XI. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support for the period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands in common with those of the other tribes of said district, and to provide a

smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer for the term of twenty years, to instruct the Indians in their respective occupations. And the United States further agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to the sick, and shall vaccinate them; the expenses of the said school, shops, persons employed, and medical attendance to be defrayed by the United States, and not deducted from the annuities.

ARTICLE XII. The said tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter.

ARTICLE XIII. The said tribes and bands finally agree not to trade at Vancouver's Island, or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

ARTICLE XIV. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands of Indians have hereunto set their hands and seals at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS, *Governor and Superintendent.* [L.S.]

CHITS-A-MAH-HAN, the Duke of York, *Chief of the S'klallams* his x mark. [L.S.]
DAH-WHIL-LUK, *Chief of the Sko-ko-mush.* his x mark. [L.S.]
KUL-KAH-HAN, or General Pierce, *Chief of the Chem-a-kum.* his x mark. [L.S.]
HOOL-HOLE-TAN, or Jim, *Sko-ko-mish sub-chief.* his x mark. [L.S.]
SAI-A-KADE, or Frank, *Sko-ko-mish sub-chief.* his x mark. [L.S.]
LOO-GWEH-OOS, or George, *Sko-ko-mish sub-chief.* his x mark. [L.S.]

E-DAGH-TAN, or Tom, *Sko-ko-mish sub-chief.*
his x mark. [L.S.]
KAI-A-HAN, or Daniel Webster, *Chem-a-kum sub-chief.*
his x mark. [L.S.]
ETS-SAH-QUAT, *Chem-a-kum sub-chief.* his x mark. [L.S.]
KLEH-A-KUNST, *Chem-a-kum sub-chief.* his x mark. [L.S.]
HE-ATL, Duke of Clarence, *S'klallam sub-chief.*
his x mark. [L.S.]
LACH-KA-NAM, or Lord Nelson, *S'klallam sub-chief.*
his x mark. [L.S.]
TCHOTEST, *S'klallam sub-chief.* his x mark. [L.S.]
HOOT-OTE ST, or General Lane, *S'klallam sub-chief.*
his x mark. [L.S.]
TO-TOTESH, *S'klallam sub-chief.* his x mark. [L.S.]
HA-KWIA-MIHL, *S'klallam sub-chief.* his x mark. [L.S.]
SKAI-SE-EE, or Mr. Newman, *S'klallam sub-chief.*
his x mark. [L.S.]
KAHS-SAHS-A-MATL, *S'klallam sub-chief.* his x mark. [L.S.]
S'HOTE-CH-STAN, *S'klallam sub-chief.* his x mark. [L.S.]
LAH-ST, or Tom, *S'klallam sub-chief.* his x mark. [L.S.]
TULS-MET-TUM, Lord Jim, *S'klallam sub-chief.*
his x mark. [L.S.]
YAHT-LE-MIN, or General Taylor, *S'klallam sub-chief.*
his x mark. [L.S.]
KLA-KOISHT, or Captain, *S'klallam sub-chief.*
his x mark. [L.S.]
SNA-TALC, or General Scott, *S'klallam sub-chief.*
his x mark. [L.S.]
TSEH-A-TAKE, or Tom Benton, *S'klallam sub-chief.*
his x mark. [L.S.]
YAH-KWI-E-NOOK, or General Gaines, *S'klallam sub-chief.*
his x mark. [L.S.]
KAI-AT-LAH, or General Lane, Jr., *S'klallam sub-chief.*
his x mark. [L.S.]
CAPTAIN JACK, *S'klallam sub-chief.* his x mark. [L.S.]
HE-ACH-KATE, *S'klallam sub-chief.* his x mark. [L.S.]
T'SOH-AS-HAU, or General Harrison, *S'klallam sub-chief.*
his x mark. [L.S.]
KWAH-NALT-SOTE, *S'klallam sub-chief.* his x mark. [L.S.]
S'HOKE-TAN, *S'klallam sub-chief.* his x mark. [L.S.]
PAITL, *S'klallam sub-chief.* his x mark. [L.S.]
WEN-A-HAP, *S'klallam sub-chief.* his x mark. [L.S.]

KLEW-SUM-AH, *S'klallam sub-chief.* his x mark. [L.S.]
SE-ATT-HOME-TAU, *S'klallam sub-chief.* his x mark. [L.S.]
TSAT-SAT-HOOT, *S'klallam tribe.* his x mark. [L.S.]
PE-AN-HO, *S'klallam tribe.* his x mark. [L.S.]
YA-AH-HUM, or John Adams, *S'klallam tribe.* his x mark. [L.S.]
TI-ITCH-STAN, *S'klallam tribe.* his x mark. [L.S.]
SOO-YAHNTCH, *S'klallam tribe.* his x mark. [L.S.]
TTSEH-A-TAKE, *S'klallam tribe.* his x mark. [L.S.]
HE-ATS-AT-SOOT, *S'klallam tribe.* his x mark. [L.S.]
TOW-OOTS-HOOT, *S'klallam tribe.* his x mark. [L.S.]
TSHEH-HAM, or General Pierce, *S'klallam tribe.* his x mark. [L.S.]
KWIN-NAS-SUM, or George, *S'klallam tribe.* his x mark. [L.S.]
HAI-AHTS, John, *S'klallam tribe.* his x mark. [L.S.]
HAI-OTEST, John, *S'klallam tribe.* his x mark. [L.S.]
SEH-WIN-NUM, *S'klallam tribe.* his x mark. [L.S.]
YAI-TST, or George, *S'klallam tribe.* his x mark. [L.S.]
HE-PAIT, or John, *S'klallam tribe.* his x mark. [L.S.]
SLIMM, or John, *S'klallam tribe.* his x mark. [L.S.]
T'KLALT-SOOT, or Jack, *S'klallam tribe.* his x mark. [L.S.]
S'TAI-TAN, or Sam, *S'klallam tribe.* his x mark. [L.S.]
HUT-TEST-OOT, *S'klallam tribe.* his x mark. [L.S.]
HOW-A-OWL, *S'klallam tribe.* his x mark. [L.S.]

Executed in the presence of us—

M. T. SIMMONS,
C. H. MASON, *Secretary Washington Territory*,
BENJ. F. SHAW, *Interpreter*,
JOHN H. SCRANTON,
JOSIAH P. KELLER,
C. M. HITCHCOCK, M.D.,
A. B. GOVE,
H. A. GOLDSBOROUGH,
B. J. MADISON,
F. A. ROWE,
JAS. M. HUNT,
GEORGE GIBBS, *Secretary*,
JOHN J. REILLY,
ROBT. DAVIS,
S. S. FORD, Jr.,

H. D. COCK,
ORRINGTON CUSHMAN,
J. CONKLIN.

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the eighth day of March, one thousand eight hundred and fifty-nine, advise and consent to the ratification of the same, by a resolution in the words and figures following, to wit:

"IN EXECUTIVE SESSION,
"SENATE OF THE UNITED STATES, March 8, 1859.

"*Resolved*, (two-thirds of the senators present concurring,) That the Senate advise and consent to the ratification of treaty between the United States and the S'Klallams Indians occupying lands in the Straits of Fuca and Hood's Island, in Washington Territory, signed 26th January, 1855.

"Attest: "ASBURY DICKINS, *Secretary*."

Now, therefore, be it known that I, JAMES BUCHANAN, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the eighth of March, eighteen hundred and fifty-nine, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be hereto affixed, and have signed the same with my hand.

Done at the city of Washington, this twenty-ninth day of April, in the year of our Lord one thousand eight hundred and fifty-nine, and of the independence of the United States the eighty-third.

JAMES BUCHANAN.

By the President:
LEWIS CASS, *Secretary of State.*

TREATY WITH THE MAKAH TRIBE. Jan. 31, 1855.

12 Stat. 939

Treaty between the United States of America and the Makah Tribe of Indians. Concluded at Neah Bay, Washington Territory, January 31, 1855; Ratified by the Senate, March 8, 1859. Proclaimed by the President of the United States, April 18, 1859.

JAMES BUCHANAN,

PRESIDENT OF THE UNITED STATES OF AMERICA,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS a treaty was made and concluded at Neah Bay, in the Territory of Washington, on the thirty-first day of January, eighteen hundred and fifty-five, between Isaac I. Stevens, governor and superintendent of Indian affairs for said Territory, on the part of the United States, and the hereinafter-named chiefs, headmen, and delegates of the several villages of the Makah tribe of Indians, viz.: Neah Waatch, Tsoo-Yess, and Osett, occupying the country around Cape Classett or Flattery, on behalf of the said tribe and duly authorized by the same; which treaty is in the words and figures following, to wit:

Articles of agreement and convention, made and concluded at Neah Bay, in the Territory of Washington, this thirty-first day of January, in the year eighteen hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the several villages of the Makah tribe of Indians, viz: Neah Waatch, Tsoo-Yess, and Osett, occupying the country around Cape Classett or Flattery, on behalf of the said tribe and duly authorized by the same.

ARTICLE I. The said tribe hereby cedes, relinquishes, and conveys to the United States all their right, title, and interest in and to the lands and country occupied by it, bounded and described as follows, viz: Commencing at the mouth of the

Oke-ho River, on the Straits of Fuca; thence running westwardly with said straits to Cape Classett or Flattery; thence southwardly along the coast to Osett, or the lower Cape Flattery; thence eastwardly along the line of lands occupied by the Kew-déh-tut or Kwill-eh-yute tribe of Indians, to the summit of the coast range of mountains, and thence northwardly along the line of lands lately ceded to the United States by the S'Klallam tribe to the place of beginning, including all the island lying off the same on the straits and coast.

ARTICLE II. There is, however, reserved for the present use and occupation of the said tribe the following tract of land, viz: Commencing on the beach at the mouth of a small brook running into Neah Bay next to the site of the old Spanish fort; thence along the shore round Cape Classett or Flattery, to the mouth of another small stream running into the bay on the south side of said cape, a little above the Waatch village; thence following said brook to its source; thence in a straight line to the source of the first-mentioned brook, and thence following the same down to the place of beginning; which said tract shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribe and of the superintendent or agent; but if necessary for the public convenience, roads may be run through the said reservation, the Indians being compensated for any damage thereby done them. It is, however, understood that should the President of the United States here-after see fit to place upon the said reservation any other friendly tribe or band to occupy the same in common with those above mentioned, he shall be at liberty to do so.

ARTICLE III. The said tribe agrees to remove to and settle upon the said reservation, if required so to do, within one year after the ratification of this treaty, or sooner, if the means are furnished them. In the mean time it shall be lawful for them to reside upon any land not in the actual claim and occupation of citizens of the United States, and upon any land claimed or occupied, if with the permission of the owner.

ARTICLE IV. The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands:

Provided, however, That they shall not take shell-fish from any beds staked or cultivated by citizens.

ARTICLE V. In consideration of the above cession the United States agree to pay to the said tribe the sum of thirty thousand dollars, in the following manner, that is to say: During the first year after the ratification hereof, three thousand dollars; for the next two years, twenty-five hundred dollars each year; for the next three years, two thousand dollars each year; for the next four years, one thousand five hundred dollars each year; and for the next ten years, one thousand dollars each year; all which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may from time to time determine at his discretion upon what beneficial objects to expend the same. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of wishes of said Indians in respect thereto.

ARTICLE VI. To enable the said Indians to remove to and settle upon their aforesaid reservation, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of three thousand dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve. And any substantial improvements heretofore made by any individual Indian, and which he may be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President and payment made therefor accordingly.

ARTICLE VII. The President may hereafter, when in his opinion the interests of the Territory shall require, and the welfare of said Indians be promoted thereby, remove them from said reservation to such suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands; and he may further, at his discretion, cause the whole, or any portion of the lands hereby reserved, or such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate thereon as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be practicable.

ARTICLE VIII. The annuities of the aforesaid tribe shall not be taken to pay the debts of individuals.

ARTICLE IX. The said Indians acknowledge their dependence on the government of the United States, and promise to be friendly with all citizens thereof, and they pledge themselves to commit no depredations on the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and other Indians to the Government of the United States or its agent for decision and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article in case of depredations against citizens. And the said tribe agrees not to shelter or conceal offenders against the United States, but to deliver up the same for trial by the authorities.

ARTICLE X. The above tribe is desirous to exclude from its reservation the use of ardent spirits, and to prevent its people from drinking the same, and therefore it is provided that any Indian belonging thereto who shall be guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE XI. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support for the period of twenty years, an agricultural and industrial school, to be free to children of the said tribe in common with those of the other tribes of said district and to provide a smithy and carpenter's shop, and furnish them with the necessary tools and employ a blacksmith, carpenter and farmer for the like term to instruct the Indians in their respective occupations. *Provided, however,* That should it be deemed expedient a separate school may be established for the benefit of said tribe and such others as may be associated with it, and the like persons employed for the same purposes at some other suitable place. And the United States further agree to employ a physician to reside at the said central agency, or at such other school should one be

established, who shall furnish medicine and advice to the sick, and shall vaccinate them; the expenses of the said school, shops, persons employed, and medical attendance to be defrayed by the United States and not deducted from the annuities.

ARTICLE XII. The said tribe agrees to free all slaves now held by its people and not to purchase or acquire others hereafter.

ARTICLE XIII. The said tribe finally agrees not to trade at Vancouver's Island or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside in its reservation without consent of the superintendent or agent.

ARTICLE XIV. This treaty shall be obligatory on the contracting parties a soon as the same shall be ratified by the President of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and the undersigned, chiefs, headmen and delegates of the tribe aforesaid have hereunto set their hands and seals at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS, *Governor and Superintendent.* [L.S.]
TSE-KAUWTL, *Head Chief of the Makah Tribe.*
his x mark. [L.S.]
KAL-CHOTE, *Sub-chief of the Makahs.* his x mark. [L.S.]
TAH-A-HOWTL, *Sub-chief of the Makahs.* his x mark. [L.S.]
KAH-BACH-SAT, *Sub-chief of the Makahs.* his x mark. [L.S.]
KETS-KUS-SUM, *Sub-chief of the Makahs.* his x mark. [L.S.]
HAATSE, *Sub-chief of the Makahs.* his x mark. [L.S.]
KEH-CHOOK, *Sub-chief of the Makahs.* his x mark. [L.S.]
IT-AN-DA-HA, *Sub-chief of the Makahs.* his x mark. [L.S.]
KAH-PE-AN-HIE, or Andrew Jackson, *Sub-chief of the Makahs.*
his x mark. [L.S.]
TSAL-AB-OOS, or Peter, *Neah Village.* his x mark. [L.S.]
TAHOLA, *Neah Village.* his x mark. [L.S.]
KLEHT-LI-QUAT-STL, *Waatch Village.* his x mark. [L.S.]
TOO-WHAII-TAN, *Waatch Village.* his x mark. [L.S.]
TAHTS-KIN, *Neah Village.* his x mark. [L.S.]

NENCHOOP, *Neah Village.*	his x mark.	[L.S.]
AH-DE-AK-TOO-AH, *Osett Village.*	his x mark.	[L.S.]
WILLIAM, *Neah Village.*	his x mark.	[L.S.]
WAK-KEP-TUP, *Waatch Village.*	his x mark.	[L.S.]
KLAHT-TE-DI-YUKE, *Waatch Village.*	his x mark.	[L.S.]
OOBICK, *Waatch Village.*	his x mark.	[L.S.]
BICH-TOOK, *Waatch Village.*	his x mark.	[L.S.]
BAHT-SE-DITL, *Neah Village.*	his x mark.	[L.S.]
WACK-SHIE, *Neah Village.*	his x mark.	[L.S.]
HAH-YO-HWA, *Waatch Village.*	his x mark.	[L.S.]
DAHT-LEEK, or Mines, *Osett Village.*	his x mark.	[L.S.]
PAH-HAT, *Neah Village.*	his x mark.	[L.S.]
PAI-YEH, *Osett Village.*	his x mark.	[L.S.]
TSAH-WEH-SUP, *Neah Village.*	his x mark.	[L.S.]
AL-IS-KAH, *Osett Village.*	his x mark.	[L.S.]
KWE-TOW'TL, *Neah Village.*	his x mark.	[L.S.]
TCHOO-QUUT-LAH, or Yes Sir, *Neah Village.*	his x mark.	[L.S.]
KLATTS-OW-SEHP, *Neah Village.*	his x mark.	[L.S.]
KAI-KL-CHIS-SUM, *Neah Village.*	his x mark.	[L.S.]
KAH-KWT-LIT-HA, *Waatch Village.*	his x mark.	[L.S.]
HE-DAH-TITL, *Neah Village.*	his x mark.	[L.S.]
SAH-DIT-LE-UAD, *Waatch Village.*	his x mark.	[L.S.]
KLAH-KU-PIHL, *Tsoo-yess Village.*	his x mark.	[L.S.]
BILLUK-WHTL, *Tsoo-yess Village.*	his x mark.	[L.S.]
KWAH-TOO-QHALH, *Tsoo-yess Village.*	his x mark.	[L.S.]
YOOCH-BOOTT, *Tsoo-yess Village.*	his x mark.	[L.S.]
SWELL, or Jeff. Davis, *Neah Village.*	his x mark.	[L.S.]

Executed in the presence of us. The words "five hundred" being first interlined in the 5th article, and erasures made in the 8th and 9th articles.

M. T. SIMMONS, *Indian Agent.*
GEORGE GIBBS, *Secretary.*
B. F. SHAW, *Interpreter,*
C. M. HITCHCOCK, M.D.,
E. S. FOWLER.
ORRINGTON CUSHMAN,
ROBT. DAVIS.

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the eighth day of March, one thousand eight hundred and fifty-nine, advise and consent to the ratification of the same, by a resolution in the words and figures following, to wit:—

"IN EXECUTIVE SESSION,
"SENATE OF THE UNITED STATES, March 8, 1859.

"*Resolved*, (two-thirds of the senators present concurring,) That the Senate advise and consent to the ratification of treaty between the United States and the chiefs, headmen, and delegates of the Makah tribes of Indians occupying the country around Cape Classett or Flattery, in Washington Territory, signed 31st January, 1855.

"Attest: "ASBURY DICKINS, *Secretary.*"

Now, therefore, be it known that I, JAMES BUCHANAN, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of March eighth, eighteen hundred and fifty-nine, hereby accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be hereto affixed, and have signed the same with my hand.

Done at the city of Washington, this eighteenth day of April, in the year of our Lord one thousand eight hundred and fifty-nine, and of the independence of the United States the eighty-third.

JAMES BUCHANAN.

By the President:
LEWIS CASS, *Secretary of State.*

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TREATY WITH THE QUI-NAI-ELTS, &c. July 1, 1855. Jan. 25, 1856.

12 Stat. 971

Treaty between the United States and the Qui-nai-elt and Quil-leh-ute Indians. Concluded on the Qui-nai-elt River, in the Territory of Washington, July 1, 1855, and at the city of Olympia, January 25, 1856. Ratified by the Senate, March 8, 1859. Proclaimed by the President of the United States, April 11, 1859.

JAMES BUCHANAN,

PRESIDENT OF THE UNITED STATES OF AMERICA,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS a treaty was made and concluded on the Qui-nai-elt River, in the Territory of Washington, on the first day of July, one thousand eight hundred and fifty-five, and at the city of Olympia also in said Territory, on the twenty-fifth day of January, one thousand eight hundred and fifty-six, between Isaac I. Stevens, governor and superintendent of Indian affairs in the Territory aforesaid, on the part of the United States, and the hereinafter-named chiefs, headmen, and delegates of the different tribes and bands of the Qui-nai-elt and Quil-leh-ute Indians, on the part of said tribes and bands, and duly authorized thereto by them; which treaty is in the words and figures following, to wit:—

Articles of agreement and convention made and concluded by and between Isaac I. Stevens, governor and superintendent of Indian affairs, of the Territory of Washington, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the different tribes and bands of the Qui-nai-elt and Quil-leh-ute Indians, on the part of said tribes and bands, and duly authorized thereto by them.

ARTICLE I. The said tribes and bands hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them,

bounded and described as follows: Commencing at a point on the Pacific coast, which is the southwest corner of the lands lately ceded by the Makah tribe of Indians to the United States, and running easterly with and along the southern boundary of the said Makah tribe to the middle of the coast range of mountains; thence southerly with said range of mountains to their intersection with the dividing ridge between the Chehalis and Quiniatl Rivers; thence westerly with said ridge to the Pacific coast; thence northerly along said coast to the place of beginning.

ARTICLE II. There shall, however, be reserved, for the use and occupation of the tribes and bands aforesaid, a tract or tracts of land sufficient for their wants within the Territory of Washington, to be selected by the President of the United States, and hereafter surveyed or located and set apart for their exclusive use, and no white man shall be permitted to reside thereon without permission of the tribe and of the superintendent of Indian affairs or Indian agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the mean time it shall be lawful for them to reside upon any lands not in the actual claim and occupation of citizens of the United States, and upon any lands claimed or occupied, if with the permission of the owner of claimant. If necessary for the public convenience, roads may be run through said reservation, on compensation being made for any damage sustained thereby.

ARTICLE III. The right of taking fish at all usual and accustomed grounds and stations is secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing the same; together with the privilege of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands. *Provided, however,* That they shall not take shell-fish from any beds staked or cultivated by citizens; and provided, also, that they shall alter all stallions not intended for breeding, and keep up and confine the stallions themselves.

ARTICLE IV. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of twenty-five thousand dollars, in the following manner, that is to say: For the first year after the ratification hereof, two thousand five hundred dollars; for the next two years, two thousand dollars each year; for the next three years, one

thousand six hundred dollars each year; for the next four years, one thousand three hundred dollars each year; for the next five years, one thousand dollars each year; and for the next five years, seven hundred dollars each year. All of which sums of money shall be applied to the use and benefit of the said Indians under the directions of the President of the United States, who may from time to time determine at his discretion upon what beneficial objects to expend the same; and the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

ARTICLE V. To enable the said Indians to remove to and settle upon such reservation as may be selected for them by the President, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of two thousand five hundred dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

ARTICLE VI. The President may hereafter, when in his opinion the interests of the Territory shall require, and the welfare of the said Indians be promoted by it, remove them from said reservation or reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands, in which latter case the annuities, payable to the consolidated tribes respectively, shall also be consolidated; and he may further, at his discretion, cause the whole or any portion of the lands to be reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indians, and which they shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment made accordingly therefor.

ARTICLE VII. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

ARTICLE VIII. The said tribes and bands acknowledge their dependence on the government of the United States, and

promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations on the property of such citizens; and should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and other Indians to the Government of the United States, or its agent, for decision, and abide thereby; and if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as is prescribed in this article in cases of depredations against citizens. And the said tribes and bands agree not to shelter or conceal offenders against the laws of the United States, but to deliver them to the authorities for trial.

ARTICLE IX. The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided that any Indian belonging to said tribes who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her, for such time as the President may determine.

ARTICLE X. The United States further agree to establish at the general agency for the district of Puget Sound, within one year from the ratification hereof, and to support for a period of twenty years, an agricultural and industrial school, to be free to the children of the said tribes and bands in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and to employ a blacksmith, carpenter, and farmer for the term of twenty years, to instruct the Indians in their respective occupations. And the United States further agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of the said school, shops, employees, and medical attendance to be defrayed by the United States, and not deducted from their annuities.

ARTICLE XI. The said tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter.

ARTICLE XII. The said tribes and bands finally agree not to trade at Vancouver's Island or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside on their reservations without consent of the superintendent or agent.

ARTICLE XIII. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands of Indians, have hereunto set their hands and seals, at Olympia, January 25, 1856, and on the Qui-nai-elt River, July 1, 1855.

ISAAC I. STEVENS, *Governor and Sup't of Indian Affairs*. [L.S.]

TAH-HO-LAH, *Head Chief of Qui-nite-'l tribe*, his x mark. [L.S.]

HOW-YAT'L, *Head Chief of Quil-ley-yute tribe*, his x mark. [L.S.]

KAL-LAPE, *Sub-chief of Quil-ley-yutes*, his x mark. [L.S.]

TAH-AH-HA-WHT'L, *Sub-chief of Quil-ley-yutes*, his x mark. [L.S.]

LAY-LE-WHASH-ER, his x mark. [L.S.]
E-MAH-LAH-CUP, his x mark. [L.S.]
ASH-CHAK-A-WICK, his x mark. [L.S.]
AY-A-QUAN, his x mark. [L.S.]
YATS-SEE-O-KOP, his x mark. [L.S.]
KARTS-SO-PE-AH, his x mark. [L.S.]
QUAT-A-DE-TOT'L, his x mark. [L.S.]
NOW-AH-ISM, his x mark. [L.S.]
CLA-KISH-KA, his x mark. [L.S.]
KLER-WAY-SR-HUN, his x mark. [L.S.]
QUAR-TER-HEIT'L, his x mark. [L.S.]
HAY-NEE-SI-OOS, his x mark. [L.S.]
HOO-E-YAS'LSEE, his x mark. [L.S.]
QUILT-LE-SE-MAH, his x mark. [L.S.]
QUA-LATS-KAIM, his x mark. [L.S.]
YAH-LE-HUM, his x mark. [L.S.]
JE-TAH-LET-SHIN, his x mark. [L.S.]
MA-TA-A-HA, his x mark. [L.S.]

WAH-KEE-NAH, *Sub-chief of Qui-nite-'l tribe*, his x mark. [L.S.]

YER-AY-LET'L, *Sub-chief*,	his x mark.	[L.S.]
SILLEY-MARK'L,	his x mark.	[L.S.]
CHER-LARK-TIN,	his x mark.	[L.S.]
HOW-YAT-'L,	his x mark.	[L.S.]
KNE-SHE-GUARTSH, *Sub-chief*,	his x mark.	[L.S.]
KLAY-SUMETZ,	his x mark.	[L.S.]
KAPE,	his x mark.	[L.S.]
HAY-ET-LITE-'L, or John,	his x mark.	[L.S.]

Executed in the presence of us; the words "or tracts," in the II. article, and "next," in the IV. article, being interlined prior to execution.

M. T. SIMMONS, *Special Indian Agent.*
H. A. GOLDSBOROUGH, *Commissary, &c.*
B. F. SHAW, *Interpreter.*
JAMES MILTON, *Surveyor-General Washington Territory.*
F. KENNEDY.
J. Y. MILLER.
H. D. COCK.

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the eighth day of March, one thousand eight hundred and fifty-nine, advise and consent to the ratification of the same by a resolution in the words and figures following, to wit:—

"IN EXECUTIVE SESSION,
"SENATE OF THE UNITED STATES, March 8, 1859.

"*Resolved*, (two-thirds of the senators present concurring,) That the Senate advise and consent to the ratification of treaty between the United States and the chiefs, headmen, and delegates of the different tribes and bands of the Qui-nai-elt and Quil-leh-ute Indians in Washington Territory, signed 1st day of July, 1855, and 25th day of January, 1856.

"Attest: "ASBURY DICKINS, *Secretary.*"

Now, therefore, be it known that I, JAMES BUCHANAN, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of March the eighth, one thousand eight

hundred and fifty-nine, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be hereto affixed, and have signed the same with my hand.

Done at the city of Washington, this eleventh day of April, in the year of our Lord one thousand eight hundred and fifty-nine, and of the Independence of the United States the eighty-third.

JAMES BUCHANAN.

By the President:
LEWIS CASS, *Secretary of State.*

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TRANSCRIPTION

Land
14262-1905

March 20, 1905

Henry F. Liston, Esq.
Superintendent in charge, Puyallup Agency,
Tacoma, Washington

Sir:

In your letter of February 14, 1905, you state that the S'Klallam Indians living near the village of Jamestown, Washington, under your charge, have made complaint to you with request that you lay the matter before this Office for an opinion in the premises. The Indians allege that they have been for generations taking clams from the tide lands of Sequim Bay, near Dungeness, without interference from anybody; that now three white men, George Davis, James Dick and Frank Fisher have leased these tide lands from the State of Washington, as claimed for a term of five years and have notified the Indians to cease digging clams, under penalty of prosecution. You state that the Indians use the clams not only for food, but also sell them to canning factories between the months of April and September; that they use them more especially as bate [sic] for crab fishing, which last occupation is practically the means by which they live; that they think that under the treaty with Governor Isaac I. Stevens, it was intended that they should not be prevented from digging these clams when and where the [sic] desire.

You further state that there is no reservation at the place named; that the only land the Indians have there is a small tract which they have purchased; that this is insufficient for them to make a living upon; that there is no question but that it will work a great hardship upon these Indians if they are prevented from

digging clams on their accustomed grounds. You have referred them to the treaty of January 26, 1855, with the said Indians, (12 Stats. 933), article 4 of which is as follows:

> The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all persons of the United States; and of erecting temporary houses of the purpose of curing; together with the privilege of hunting and gathering roots, and berries on open and unclaimed lands.
>
> Provided, however, that they shall not take shell fish from any beds staked or cultivated by citizens.

You remark that the clam beds in question have never been cultivated; that the Indians wish to know whether they may be permitted to continue digging the clams from the tide lands of Sequim Bay, or whether it will be necessary for them to lease the lands in question from the State of Washington.

In reply you are advised that as the tide lands to which you refer are not embraced within the boundaries of an Indian reservation, it is the opinion of this office that such lands are under the control and jurisdiction of the State; that the Indians should not be permitted to trespass upon the tide lands leased from the State; that in case they desire special privileges as to the digging of clams from the tidelands [sic] referred to, it will be necessary for them to lease the same from the State of Washington.

However, if there are tide lands used in common by the citizens in that region, the Indians, under said article 4, have the right to take fish, clams, etc. from such lands. It does not appear from the statements contained in your letter that the citizens to whom you refer are interfering with the village used and occupied by the Indians and which appears to have been purchased by them.

You will advise the Indians mentioned of the views of this office respecting the matter involved.

Very respectfully,

[signature illegible]

Acting Commissioner

File reference:
Record Group 75, Records of the Bureau of Indian Affairs
Letters Sent, 1870-1908
Land Division, March 20, 1905
Volume 372, pages 440-442

Supreme Court, U.S.
FILED
1999
OFFICE OF THE CLERK

Nos. 98-1026, 98-1028, 98-1039, 98-1052

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

STATE OF WASHINGTON, *Petitioner*,

- and -

PUGET SOUND SHELLFISH GROWERS, *Petitioners*,

- and -

26 TIDELAND AND UPLAND PRIVATE PROPERTY OWNERS ("UPOW"), *Petitioners*,

- and -

LARRY B. AND SHIRLEE ALEXANDER, *et al.* and WILLIAM AND CHARMOND ADKINS, *et al.*, *Petitioners*,

vs.

UNITED STATES OF AMERICA, *et al.*, *Respondents*.

On Petitions For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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ABBREVIATIONS

CR	Clerk's Record (District Court Docket Number)
ER	Excerpt of Record (Prepared for Court of Appeals)
SER	Supplemental Excerpt of Record (Prepared for Court of Appeals)
PL-	Plaintiffs' Exhibit
D-	Defendants' Exhibit

INTRODUCTION

The four petitions for certiorari present ten questions, none of which implicates a conflict in authority among the Courts of Appeals or with a State Supreme Court. A number of questions rest on incorrect premises, and a number would require this Court to engage in the heavily factbound examination of the record already conducted by the courts below. In all instances, petitioners press arguments that mark a clear departure from the plain treaty language and this Court's precedents. The petitions should be denied.

The courts below held that, in entering into five nearly identical treaties with the tribes of western Washington (the Stevens treaties), the United States made a promise that the tribes would enjoy a permanent, meaningful right to take shellfish from natural shellfish beds and that this promise should be honored today. Under the treaties, (1) "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens," (the fishing right); (2) "*Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens" (the shellfish proviso). Treaty of Medicine Creek, Art. III, 10 Stat. 1132, 1133 (1854).

The majority of petitioners' questions concern the scope of the fishing right. Certiorari on those questions is unwarranted because in seven previous decisions this Court already has explored the meaning of that right and the courts below fully adhered to those decisions. There is no conflict with any other court.

This Court has not considered the shellfish proviso previously, but review of its meaning is unwarranted for two reasons: first, because there exist no other treaties containing language about shellfish beds, and the interpretation of the proviso therefore does not implicate any broader concerns; and, second, because the courts below reached their conclusion as to its meaning based on a careful, factbound examination of the type that this Court typically will not revisit. Petitioners also complain about the standard of review utilized by the Court of Appeals in addressing the proviso's meaning, but their claims of conflict or error on this point do not withstand scrutiny.

Finally, the dire harm claimed by petitioners from the decisions below is demonstrably overstated and unquestionably irrelevant to the treaties' interpretation. Because the Court of Appeals' decision is consistent with the previous opinions of this Court, and because no conflict exists with the decisions of any other court, the petitions should be denied.

STATEMENT OF THE CASE

I. Factual Background

From time immemorial, the Indian people of western Washington have been a fishing people, "us[ing] and rel[ying] on fish, including shellfish, for subsistence, ceremonial and commercial purposes." App. 69; *see also* App. 10. The uncontested archaeological and anthropological record demonstrates "widespread and sustained use of shellfish resources [by the tribes] for the last ca. 3,000 years," PL-587 at 41, with over a thousand archaeological sites evidencing continuous use by the tribes of at least 114 species of shellfish. SER 1026-27. At the time of the treaties, the tribes "engaged in extensive shellfishing." ER 54. Using the same seaworthy canoes they used for other fishing purposes, they took shellfish from deep water, and they also took large quantities of intertidal clams and oysters. Long lengths of kelp line joined together, for example, yielded sea urchins from deep water "in great quantity." SER 281-82; SER 695.[1] "Shellfish formed a staple in [the tribes'] diet," ER 55 (quoting *United States v. Aam*, 887 F.2d 190, 195 (CA9 1989)), and they were used for religious and cultural reasons, in trade with Indians and non-Indians, as tools and medicine, and for myriad other purposes. SER 1033-34, 696-97.[2]

The tribes' extensive reliance on shellfish was no mystery to the United States' treaty negotiators. App. 10. Underscoring the great commercial importance of shellfish to the Indians, Isaac Stevens, the Governor of the

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[1] The State's claim that tribes "did not venture into deep water to take shellfish" is thus inconsistent with the record. State Pet. at 2, 5.

[2] Petitioners' concerted efforts to minimize the importance of shellfish to the tribes cannot be squared with these findings, which the Ninth Circuit described as supported by "extensive persuasive evidence." App. 10.

Washington Territory, reported in 1854 that the Indians "catch most of our fish, supplying not only our people with clams and oysters, but salmon to those who cure and export it." *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, (Fishing Vessel)* 443 U.S. 658, 666 n.8 (1979) (quotation omitted); ER 55. George Gibbs, the principal treaty draftsman, likewise recorded in his diaries that the Indians took a "great variety" of shellfish, and that "many of these [were] dried for winter stores." *Id.*

In 1854 and 1855, the United States and respondent tribes entered into the treaties at issue here. The United States sought to extinguish the Indians' title to land, while at the same time protecting the Indians' access to the fisheries on which it knew their survival and way of life to depend. App. 11. Prior to the negotiations, Governor Stevens expressed concern that settlers taking up Donation Act land claims had attempted to bar Indian access to fishing grounds. "The subject of the right of fisheries is one upon which legislation is demanded," Stevens wrote. *Fishing Vessel*, 443 U.S. at 666 n.9 (quotation omitted) "It never could have been the intention of Congress that Indians should be excluded from their ancient fisheries." *Id.* (quotation omitted); PL-160, ch. 1 at 16.[3]

For their part, the Indians stated repeatedly during the negotiations that while they would cede millions of acres of territory, they had to retain meaningful access to the fisheries that were their lifeblood. As the district court observed, "it is clear from the treaty minutes that . . . the guarantee of fishing rights was a *sine qua non* of the Indians' participation in the Treaties. The Indians repeatedly raised concerns that they would not survive if they did not have access to their ancient fisheries." App. 67. The negotiation sessions thus

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[3] Settlers' claims under the Donation Act were to upland areas. The Alexander petitioners' contention that large areas of tidelands were covered by development at treaty times is incorrect. Pet. at 3. Although there were some mills and other developments on the tidelands, they covered a miniscule portion of the thousands of miles of shoreline. 1994 Tr. at 1707, 1713-14. Given that they knew that abundant shellfish were taken even in the vicinity of populous cities like New York and Boston, the treaty commissioners had no reason to believe that the nascent tideland development in the Puget Sound posed any threat to the Indians' use of the "inexhaustible" shellfish resource. App. 72; SER 128-30.

reaffirmed the American commissioners' conviction that the treaties had to preserve for the tribes their ability to continue their fishing way of life. Not only did the United States' negotiators recognize that the "Indians viewed a guarantee of permanent fishing rights as an absolute predicate to entering into a treaty with the United States," App. 11, but they also saw such a guarantee as ensuring against Indian dependence on the United States for support, a result they explicitly had been told to avoid. App. 69; ER 699.

Accordingly, Governor Stevens promised the Indians that under the treaties they would enjoy a permanent, meaningful right to continue their fishing way of life:

> The one significant promise for purposes of this litigation is the promise by the United States to the Indians that they would enjoy a permanent right to fish as they always had. This right was promised as a sacred entitlement, one which the United States had a moral obligation to protect. The Indians were repeatedly assured that they would continue to enjoy the right to fish as they always had, in the places where they had always fished. There is no indication in the minutes of the treaty proceedings that the Indians were ever told that they would be excluded from any of their ancient fisheries.

App. 27 (quoting App. 67). Stevens declared that "[t]his paper secures your fish," *Fishing Vessel*, 443 U.S. at 667 n.11 (quotation omitted), and there is no suggestion in the treaty records that the United States intended, or the Indians understood, the shellfisheries to be excluded from this fundamental promise. App. 67-68. As the district court put it, the Indians did not "believe[] that their need for shellfish would diminish over time," App. 70, but instead believed themselves to be "bargaining for a permanent right." *Id.*

The United States negotiators also sought to protect the non-Indian "shellfish-cultivation industry [that] had begun to develop at Shoalwater Bay in the Washington Territory" and that was "modeled after the larger, older, and more developed shellfish industry on the east coast." App. 11, 64-65. This industry was based on the creation of shellfish beds for storage or growth purposes where natural beds of that shellfish type did not exist. As the district court found and

the Court of Appeals affirmed, these man-made beds were commonly referred to as "staked" or "cultivated" beds:

> Shellfish farmers created "cultivated" beds (ones on which shellfish spawn would not naturally set) by removing oysters from their natural beds to areas where they could grow more rapidly, or by placing shells or other material to harden the bottom and thereby facilitate the setting of the oysters. In addition to creating cultivated beds, shellfish farmers frequently "staked" beds of shellfish by storing market-sized shellfish removed from other beds until they could be shipped to market. These staked beds did not naturally contain shellfish of the type being stored, and their boundaries were marked for identification purposes with stakes extending above the surface of the water at high tide.

App. 11.

While exclusive rights to staked or cultivated beds could be created, the public at treaty times vigorously insisted on its right of access to natural shellfish beds, and that right was consistently upheld in court decisions and by statute.[4] Newspaper and magazine articles, industry treatises, letters and journals written by commercial fishermen and, most importantly, the writings of the treaty commissioners themselves, consistently drew the same distinction between staked or cultivated and natural shellfish beds. As the courts below concluded, then, in prohibiting tribal shellfishing from "beds staked or cultivated by citizens," the treaty negotiators provided protection for the artificial beds that formed the foundation of the growing shellfish industry in the Washington Territory, while remaining faithful to their promise that the tribes would retain a permanent right of access to their fisheries, including the natural shellfish beds.[5]

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[4] The growers are incorrect in claiming that the law was not uniform. Growers' Pet. at 5, 8. Before the treaties only Rhode Island had even briefly allowed the staking or cultivating of a natural shellfish bed, but it rescinded that provision before the treaties. PL-160, ch. 2 at 40-41.

[5] Petitioners repeatedly claim that the proviso interpretation set forth by the courts below rests solely on a technical interpretation of "east coast" law. State Pet. at 10, 28; Grower Pet. at 5, 8; Alexander Pet. at 11, 20,

The promise was kept for many decades. In the first two decades after the treaties the Territorial legislature passed general statutes regulating the taking of shellfish on four occasions. SER 870-72. Each of those statutes provided legal protection for creators of artificial shellfish beds while maintaining the public's right to take shellfish from natural beds. After Washington's admission to the Union in 1889 it passed statutes permitting the sale of tidelands. App. 12. However, even after more than a decade of private ownership, the State continued to recognize that the public generally, and treaty Indians in particular, could take shellfish from natural beds on those tidelands. PL-160, ch. 4 at 39-43; SER 898-900. It was not until more than fifty years after the treaties that the Washington Supreme Court held, without any specific consideration of treaty rights, that a lessee of tidelands could exclude the general public from natural beds. *Sequim Bay Canning Co. v. Bugge*, 94 P. 922 (Wash. 1908). In the years following, the State sold off the "vast majority" of its tidelands, App. 73,[6] and the tribes who had been promised permanent rights to their fisheries saw

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25. Mere repetition cannot make this so. To the contrary, the "district court 'interpret[ed] the terms 'staked' and 'cultivated' as the terms were defined and used in the shellfishing industry at and before treaty time.'" App. 26 (quoting App. 77). The "compelling and persuasive" evidence, App. 55, the court canvassed regarding the proviso's meaning included not simply the legal framework of the time, but also "evidence of actual shellfish industry practices" on the east coast *and* in the Washington Territory, App. 61, including industry treatises, newspaper articles, and *the writings of George Gibbs, the principal treaty drafter*. App. 60-66.

The State would also have this Court believe that the district court simply "assumed" that the treaty negotiators were familiar with the shellfishing industry and its terminology. State Pet. 10, 28. However, the district court found the evidence that the United States' negotiators were familiar with the shellfish industry (on both coasts) and drew the terms of the proviso from it to be "compelling" and "overwhelming[]," App. 55, 59, 78, and likewise found that the Indians were familiar with the practices at Shoalwater Bay, App. 65-66. These findings are unassailable. Indeed, *petitioners' own expert* conceded that the treaty negotiators "borrow[ed] from the oystermen's terminology" to draft the proviso, D-467 at 108.

6 Despite this clear finding of fact by the district court, petitioners continue to assert that only about half of the tidelands have been sold. *See, e.g.*, State Pet. at 3, Alexander Pet. at 2.

their ability to take shellfish deteriorate as the State enforced trespass laws against tribal harvest. PL-160, ch. 4. By the time of this subproceeding, the tribes' harvest of shellfish had been reduced to a negligible percentage of the non-Indian harvest. SER 971. And the effect of the broken promise is clear. As the district court found and the Court of Appeals affirmed, "[t]he uncontroverted evidence presented at trial is that the Tribes lag significantly behind other residents of the State of Washington in their overall standard of living." App. 33.

The shellfish and other fish resources have themselves changed radically since the time of the treaties. Native oyster populations have diminished by 99%, and have been replaced by the exotic pacific oyster. SER 1004-05. Native littleneck clams have also been largely supplanted by the introduced manila clam. App. 12. The native geoduck clams that were once available in commercial quantities on the intertidal beaches of Puget Sound are now found almost exclusively in deep water as a result of non-Indian overharvest in the shallow areas. SER 992.

As the treaty negotiators intended, the commercial shellfish industry in Washington has prospered. Today the pacific oyster is the dominant species cultivated in Washington, accounting for about 60% of the annual harvest value. PL-988, Tbl. 50. Because pacific oysters do not reproduce naturally except in some areas of Hood Canal, virtually all pacific oyster beds are "artificial" under the interpretation of the shellfish proviso consistently advocated by the tribes and adopted by the courts below, and are thus off-limits to tribal harvest. In recent years, numerous artificial beds of manila clams have also been created by the growers through seeding or alteration of the substrate, and the tribes have again disclaimed any rights to those beds. PL-535, vol. 1, ch. 6 at 13.

II. Course of Proceedings

In 1970 the United States sued Washington to implement the fishing rights of several Indian tribes. The district court held, and this Court ultimately affirmed, that the tribes have a right to take up to half of the anadromous fish found in their fishing areas. *Fishing Vessel*, 443 U.S. at 671, 685-87.

The district court retained jurisdiction to adjudicate the tribes' rights to other fish species.

The shellfish subproceeding began in 1989. ER 9. By pretrial motion, the district court held that under the plain language of the treaties, and the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative," *Colautti v. Franklin*, 439 U.S. 379, 392 (1979), the "right of taking fish" includes the right to take shellfish. App. 56.[7] The court then held an exhaustive three-week bench trial, after which it issued an opinion holding that the tribes' rights of taking shellfish are co-extensive with their rights to other fish, except to the extent limited by the shellfish proviso. App. 52-53. The court concluded, based on evidence it considered "compelling," App. 55, 59, and "overwhelming[]" App. 78, that the proviso limits tribes from taking shellfish only from those artificial shellfish beds created by citizens where no natural bed of that species exists.[8] App. 77.

The district court then issued two orders imposing stringent limitations on tribal shellfishing in order to protect the interests of private landowners. The court held that the tribes may harvest shellfish from private tidelands – even for subsistence purposes – only five days a year (with some increase on larger lots), and only after providing landowners with one-month's notice and conducting (at their own expense) scientific surveys establishing the presence of natural shellfish populations. App. 126-27. The court also prohibited tribal access across privately owned uplands to reach shellfishing areas unless "[t]ribal members can demonstrate the absence of access by boat, public road, or public right of way." App. 146. All parties appealed.

The Court of Appeals, in an opinion by Judge Trott, affirmed the district court's interpretation of the treaties. The court also affirmed the stringent limitations placed on

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[7] No petitioner challenged this holding in the Court of Appeals, and none challenges it here.

[8] The court did not say that a cultivated area could "never" have supported a natural bed. State Pet. at 10. Under the court's opinion, for example, an artificial bed of pacific oysters can be created on a site where the native oyster existed long ago.

tribal shellfishing from private tidelands and on uplands access. App. 37-40.[9] Finally, the Court of Appeals made it clear that the tribes are permitted a share only of those shellfish that would be present naturally on the commercial growers' beds absent the growers' efforts; the growers are entitled to the entire fruits of their labor and investment in their tidelands. App. 33-35. The court then remanded for a factual determination of what portion of each growers' beds are exempt from tribal harvest because they result from the growers' efforts. *Id.* The district court has referred remanded issues to another judge for mediation. CR 16608.

REASONS FOR DENYING THE PETITIONS

I. The Court of Appeals Created No Conflict by Refusing to Graft Species or Technology-Based Limitations Onto Express Treaty Language.

The State seeks certiorari on the question whether "there is a treaty right to take half of an off reservation natural resource, such as deep water shellfish, where Indians did not take that resource at treaty time." State Pet. i. The question rests on an incorrect factual premise, does not implicate any conflict in authority, and seeks a repudiation of the plain language of the treaties.

The treaties here reserve to the tribes the right of taking "fish," which, as the courts below noted, has "'perhaps the widest sweep of any word the drafters could have chosen.'" App. 18 (quoting App. 57). The tribes may exercise their fishing right "at all usual and accustomed grounds and stations," and those grounds and stations have already been adjudicated (in decisions which are long since final) to include significant expanses of deep water. App. 159. At treaty times the tribes took virtually every shellfish species imaginable, including species like geoduck, crab and urchins that today are found predominantly in deep water,[10] and they

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[9] While the tribes continue to believe that the restrictions are overly harsh, they have not sought certiorari.

[10] *See, e.g.*, SER 1026, 181, 213, 792-97, 1027, 1049, 1053-56, 1096 (archaeological and anthropological evidence that tribes took at least 114 species of shellfish, including cucumbers, urchins, scallops, crabs, octopus, and geoduck).

took those shellfish from deep and shallow water.[11] The factual premise of the State's question is therefore incorrect, and its resolution would not affect the ultimate outcome in this case.

Moreover, there is no definable "resource, such as deep water shellfish." The State's focus is on species of urchin, geoduck, crab, cucumber and shrimp. While these species might be termed "resources," it is highly inaccurate to imply that they are exclusively deep water ones. Through time, advances in technology have enabled both non-Indians and Indians alike to take those species more efficiently from deep waters, and documented overharvesting by non-Indians has reduced the abundance of those species in shallow waters. While the State denies it, State Pet. at 18 n.9, what it necessarily seeks is a ruling that the tribes should not be able to take advantage of technological advances to harvest shellfish from "deeper" waters within their usual and accustomed grounds and stations.[12]

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[11] *See, e.g.*, SER 281-82, 695, 790-97, 1049-56 (describing deep water shellfishing techniques including breath-hold diving, kelp-line sinking, spearing, and dip netting). The State's claim that the tribes did not take shellfish from deep water misstates this record, which includes testimony by the State's own experts and the contemporaneous observations of non-Indians, including George Gibbs. Indeed, in the one usual and accustomed area determination it had to make as part of this proceeding, the district court found that the Upper Skagit Tribe "took fish, including shellfish" from numerous marine areas that include deep as well as shallow water. App. 91-92. (The other respondent tribes have long had adjudicated fishing areas that encompass deep water.) That finding was not appealed.

[12] Although not clear, it is possible that the State is also attempting to resurrect an argument made below that the courts should define a separate set of fishing areas for each of the hundreds of species of fish that are part of the tribal fishing right. That issue is patently inappropriate for certiorari. The decision of the courts below to adhere to the plain language of the treaties and hold that each tribe has one set of usual and accustomed grounds and stations within which it may exercise its right of taking fish is not in conflict with any other decision. In fact, as the Ninth Circuit noted, courts in this litigation have always proceeded on the basis that each tribe's adjudicated usual and accustomed grounds and stations apply to all its fishing activity. App. 19-20. Moreover, the State's proposal to define hundreds of sets of fishing areas is judicially unworkable in the extreme. App. 20.

But whether the State is arguing for a technology-based or a species-based limitation on the tribes' express fishing right, the issue it raises is not worthy of certiorari. The Court of Appeals' holding is grounded in the plain language of the treaties. "With all deference to the State, there is no language in the Treaties to support its position: the Treaties make no mention of any species-specific or technology-based restrictions on the Tribes' rights." App. 18. While the State argues that the Court of Appeals' fidelity to the treaty language brought it into conflict with this Court's decisions in *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919), and *Fishing Vessel*, and with various other decisions, no court has ever adopted the State's position.

Seufert held that the Yakama Tribe had a right to take fish on the Oregon side of the Columbia River, even though that area was outside the Yakama Tribe's ceded territory, because tribal members had habitually fished there. 249 U.S. at 198-99. That the Court examined *where* tribal members had customarily fished is unremarkable, because the treaties restrict the tribes' fishing right to their "usual and accustomed" places. The Court nowhere suggested, however, that an implicit restriction should also be grafted onto the treaties limiting the tribes to their traditional fishing *methodology* or to *species* taken at treaty times. Indeed, in *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968), this Court rejected such a rewriting of the treaties:

> [T]he *manner* in which the fishing may be done and its purpose, whether or not commercial, are not mentioned in the Treaty. We would have quite a different case if the Treaty had preserved the right to fish at the "usual and accustomed" places *in the "usual and accustomed" manner*. But the treaty is silent as to the mode or modes of fishing that are guaranteed.

Id. at 398 (italics in original).

Nor does *Fishing Vessel* contain any intimation that the tribes are restricted to fishing methodologies used or species taken at treaty times. The State points to the statement that the treaty language "'securing' certain fishing rights . . . [is] synonymous with 'reserving' rights previously exercised," 443 U.S. at 678, but ignores the Court's very next words describing that previously exercised right as quite simply

"the [tribes'] right to meet their subsistence and commercial needs by taking fish from treaty area waters," *id.* at 679, not some circumscribed right of doing so only in a certain manner or only with respect to certain species.[13]

The State further alleges a conflict between the decision below and two district court decisions, *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), and *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin ("LCO")*, 653 F. Supp. 1420, 1426-29 (W.D. Wis. 1987). A conflict with a district court decision is not a basis for certiorari. Rule 10. Moreover, both *Michigan* and *LCO* are entirely consistent with the Court of Appeals' decision here. The court in *Michigan* looked to the tribes' historic practices only to determine that a fishing right should be *implied*. It then held that such a right cannot be limited to the species taken at treaty times or the methods then used:

> The Indians' right to fish, like the aboriginal use of the fishery on which it is based, is not a static right. The reserved fishing right is not affected by the passage of time or changing conditions. The right is not limited as to species of fish, origin of fish, the purpose of use or the time or manner of taking. The right may be exercised utilizing improvements in fishing

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[13] The State also alleges a conflict between the decision below and statements by the district court in the earlier phases of this litigation (including a finding quoted in *Fishing Vessel*, 443 U.S. at 667-68). Of course, even if there is such a conflict, it is not the stuff of certiorari. And there is not. Long ago, the district court concluded that "[t]he right secured by the treaties to the Plaintiff tribes is not limited as to species of fish, the origin of fish, the purpose or use, or the time or manner of taking." 384 F. Supp. at 401. It further found that "Indian fishing was not limited to any species. They took whatever species were available at the particular season and location." 384 F. Supp. at 352. The district court has never retreated from these findings and conclusions and they have been affirmed in all respects on appeal. 520 F.2d at 693.

The State claims that an interim procedural order, known as Paragraph G, 459 F. Supp. at 1037-38, requires the tribes to put on evidence of treaty time activity before being able to engage in that activity now. State Pet. 15. However, the language of the order is entirely permissive, and in entering it the district court did not purport to alter its substantive analysis of the treaties.

> techniques, methods and gear. It may expand with the commercial market which it serves, and supply the species of fish which that market demands, whatever the origin of the fish.

471 F. Supp. at 260. The *LCO* court came to the same conclusion. 653 F. Supp. at 1430.[14]

Finally, the State alleges a conflict with two Court of Appeals' decisions. In *United States v. Dion*, 752 F.2d 1261 (CA8 1985) (*en banc*), *rev'd in part*, 476 U.S. 734 (1986), the court refused to *imply* a treaty right to sell eagles. That holding provides no support for rewriting express treaty language. *United States v. Top Sky*, 547 F.2d 486 (CA9 1976), is a previous decision of the Ninth Circuit and so cannot give rise to a circuit split. Moreover, the *Top Sky* court only held that a treaty right to hunt would not have been understood by the treating Indians to extend to the right of selling eagles because they deplored such a practice. *Id.* at 487-88. Here, the record contains no suggestion that the tribes understood their right of taking fish to be saddled with any technological or species-based limitations, and there is accordingly no tension between *Top Sky* and this case.[15]

The Court of Appeals' refusal to graft unstated restrictions onto express treaty language therefore is not in conflict with the decision of any court. Moreover, the holding is manifestly sound. It is faithful to the plain language of the treaties and a treaty record showing that neither the United States nor the Indians understood that the tribes' fishing rights would be limited to treaty time practices. The State has not presented a basis for certiorari.

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[14] The *LCO* court later concluded that a commercial lumbering right should not be *implied* in treaties that secured the right to hunt, fish and gather wild rice, because the tribes had not engaged in that activity at treaty times. 758 F. Supp. 1262, 1271 (W.D. Wis. 1991). Again, that holding suggests nothing about the contours of a right explicitly reserved.

[15] The State's own historian testified that no evidence exists of an intent to exclude any species from the tribes' fishing rights. SER 270-71.

II. Equal Sharing of The Fish Resource Is a "Matter Decided" and No Conflict Exists.

The State claims that the courts below erred in holding that the tribes are presumptively entitled to an equal share of a "resource, such as deep water shellfish, . . . where there was no historic dependence on that resource that would support an equitable allocation." State Pet. i. The State argues that the district court instead should have calculated the historic dependence of the tribes on each of the more than one hundred different species of shellfish (in fact, to be more precise, that the court should have evaluated the tribes' dependence on deepwater harvesting of each of those species), and then done a species-by-species allocation. The State's proposed factual tangle again rests on an incorrect premise and fails to implicate any conflict in authority. The approach taken by the courts below is fully consistent with this Court's precedent.

As a threshold matter, the State did not raise this issue in the district court. There it argued that the tribes' fifty percent share should be reduced because the tribes had attained a moderate living, but it never questioned the appropriateness of an equal share as the presumptive starting point in allocating the treaty right. The State first raised the issue in the Court of Appeals, and the tribes identified the State's failure to preserve the issue in their briefing to that court. Brief of Indian Tribes at 95. The Court of Appeals rejected the State's argument without addressing it, and it is inappropriate for review here. *City of Springfield v. Kibbe*, 480 U.S. 257, 259-60 (1987).

The State, moreover, continues to ignore the uncontroverted evidence that at treaty times the tribes relied upon significant harvests of the various species that the State characterizes as "deep water shellfish." *See supra* at 9-10 & nn.10, 11. The tribes have demonstrated a "historic dependence" on those species, and resolution of the question presented would therefore have no effect on the outcome below. If the State's real assertion, on the other hand, is that the tribal allocation should be reduced because those species are principally harvested in deep water today, then it is simply restating its technology argument and certiorari is inappropriate for the reasons outlined above.

Even if one overlooks the question's defects, the State's argument for certiorari does not hold up. The State does not allege a circuit split. It only claims that the courts below failed to follow the "analytical steps laid out in *Fishing Vessel*." State Pet. 19. But this is not so. The *Fishing Vessel* Court engaged in a three-step analysis of the tribes' right to an allocation. First, it found that the tribes are entitled to a division of fish. 443 U.S. at 678-79. Second, as to allocation it held that "an equitable measure of the common right should initially divide the harvestable portion . . . into approximately equal treaty and nontreaty shares." *Id.* at 685.[16] Third, it stated that the treaty share should be reduced "if tribal needs may be satisfied by a lesser amount." *Id.* "Thus, [u]pon proper submissions to the District Court . . . in response to changing circumstances," *id.* at 686-87, the tribal share can be modified.[17]

The district court conducted just that analysis. First, it concluded that shellfish are "fish" within the meaning of the treaty right, an issue no longer contested by any petitioner. ER 52-55; App. 56. The court then made an initial division of the resource into equal treaty and non-treaty shares. App. 84. It then examined whether any change in circumstances had occurred such that it should reduce the tribal share. Because "[t]he uncontroverted evidence presented at trial is that the Tribes lag significantly behind other residents of the State of Washington in their overall standard of living," App. 85, it declined to do so.[18]

The State argues that the district court instead should have performed a species-by-species allocation based solely

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[16] The Court explained that the logic of a presumptively equal share given the "in common with" language of the treaties "is manifest." *Id.* at 687 n.27. "Since the days of Solomon, such a division has been accepted as a fair apportionment of a common asset . . . ." *Id.*

[17] The Court provided examples of the kinds of changed circumstances it had in mind, such as a tribe dwindling "to just a few members," or "abandon[ing] its fisheries" after finding other sources of support. 443 U.S. at 687. No petition argues that either event has taken place.

[18] Only UPOW asks this Court to review the district court's determination regarding the tribes' current economic condition. UPOW Pet. 27-29. UPOW's factbound claim of error is an inappropriate candidate for certiorari.

on the tribes' historic use of different species. This is directly at odds with *Fishing Vessel*'s holding that the starting point in allocating a common right is an equal division of the resource. 443 U.S. at 685. Indeed, the district court has never examined the relative dependence of the tribes on each of the various species of finfish and the *Fishing Vessel* Court did not suggest that it should have. The Court did note the district court's equal allocation of those species to be consistent with other natural resource cases where, after implying a right to a resource based on historic usage, the courts have accorded tribes enough of the resource to ensure their reasonable livelihood. *Id.* at 685-86. But the Court never suggested that instead of starting with a presumptively equal allocation of an express common right a court should do a variegated species-by-species allocation analysis. Thus, there is no conflict between *Fishing Vessel* and the holding of the courts below. No court has ever interpreted *Fishing Vessel* as does the State, and the State has failed to present a basis for certiorari.

III. It Is a "Matter Decided" that the Stevens Treaties Provide a Right of Access to Private Property and Override the Presumption of the Equal Footing Doctrine, and No Conflict Exists.

Half of petitioners' questions go to the issue whether, even setting the shellfish proviso to the side, the tribes may exercise their right to take shellfish on privately owned tidelands.[19] This, however, is a matter long since decided. For more than ninety years this Court has held that the Stevens treaty right of taking fish includes the right of using private property, and that neither state-law principles nor the Equal Footing Doctrine can impair that right. In light of this settled law, petitioners' claims of conflict ring hollow.

A. Right of Access

UPOW and the Alexander petitioners present the broadest challenge, arguing that the treaty fishing right does not provide for a tribal right of access to privately owned tidelands to take shellfish. They argue that the Ninth Circuit's decision "is an unprecedented imposition of tribal usufructuary rights on private property." Alexander Pet. 12.

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[19] *See* State q.2; Alexander q.1; Growers q.2; UPOW qq.1, 3.

This is incorrect. No petitioner appealed the district court's decision that the treaty fishing right subsumes the right of taking shellfish, and *United States v. Winans*, 198 U.S. 371 (1905), squarely held that under the Stevens treaties the tribes may utilize private property to exercise that right:

> [T]he Indians were secured in [the] enjoyment [of their fishing right] by a special provision of means for its exercise. They were given "the right of taking fish at all usual and accustomed places," and the right "of erecting temporary buildings for curing them." The contingency of the future ownership of the lands, therefore, was foreseen and provided for – in other words, the Indians were given a right in the land – the right of crossing it to the river – the right to occupy it to the extent and for the purpose mentioned.

Id. at 381. Fourteen years after *Winans*, in *Seufert,* this Court upheld the rights of the Yakama tribe, without regard to private land ownership, not only to take fish on the banks of the Columbia River but to build houses on those banks to dry and cure their fish. 249 U.S. at 197-99. And sixty years after that decision, in *Fishing Vessel*, this Court was unanimous in the view that the treaty right of taking fish includes the right of using private property for that purpose, with the dissent arguing that this was a core function of the treaties:

> As was made clear in *Winans*, the purpose of the treaties was to assure to Indians the right of access over private lands so that they could continue to fish at their usual and accustomed fishing grounds.

443 U.S. at 707; *see also id.* at 677 n.22. Thus, whereas petitioners criticize the Court of Appeals for "impos[ing] servitudes" on their lands, Alexander Pet. 10, this Court has long recognized that it is the Stevens treaties themselves that "impose[ ] a servitude upon every piece of land as though described therein." *Winans*, 198 U.S. at 381.

Petitioners seek to distinguish *Winans* on two grounds. First, they argue that the only private property the tribes can utilize are "well-established trail[s]" to which they have established a "prescriptive right" through decades of open and continuous use. Alexander Pet. at 15-16; UPOW Pet. at 16-17. However, *Winans* described the scope of the treaty

servitude in much broader terms, stating simply that the treaty "fixes in the land such easements as enables the right to be exercised," 198 U.S. at 384, which is consistent with the plain language of the treaties preserving to the tribes the right of access to "*all* usual and accustomed" fishing areas. Moreover, *Winans* flatly rejected the notion that under the treaties the tribes "acquired no rights but such as they would have without the treaty." 198 U.S. at 380. To limit the treaty servitude to nothing more than a prescriptive easement that any person could establish would be to turn *Winans* completely on its head. Finally, *Fishing Vessel* is directly to the contrary, interpreting *Winans* and *Seufert* to hold that the tribes have rights "beyond those which other citizens may enjoy," 443 U.S. at 681 (quotation omitted), including the right "to cross private lands," *Id.* at 676 n.22. Again, the dissent agreed, stating that "this right, described in *Winans* as a servitude or right over land not owned by the Indians, entitled the Indians to trespass on any land when necessary to reach their traditional fishing areas, and is a right not enjoyed by non-Indian residents of the area." *Id.* at 703.

Petitioners also argue that *Winans* does not apply because it involved migratory salmon rather than immobile shellfish, and a right of access is more necessary to ensure the tribes a fair share of the former. But *Winans* did not turn on the nature of the fish being taken. And petitioners' claim that tribes can more easily secure a fair share of shellfish than salmon without access to private property is both illogical and does not withstand even a superficial examination of the record, which indicates that the "vast majority" of tidelands in Washington State are now in private ownership, App. 73, including those tidelands most naturally productive of shellfish. SER 999-1002.[20]

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[20] Petitioners are also incorrect in arguing that shellfish fall outside *Winans* because they are part of the realty under state law. Shellfish are in fact personal property, *see Edison Oyster Co. v. Pioneer Oyster Co.*, 157 P.2d 302, 307 (Wash. 1945), but their precise state law status is immaterial. *Winans* rejected the notion that treaty rights can be impaired by state law, 198 U.S. at 379, a holding reaffirmed in *Fishing Vessel*, where this Court stated that non-Indians "may not rely on property law concepts" to defeat tribes' treaty fishing rights. 443 U.S. at 684.

The decisions below therefore adhered to nearly a century of precedent from this Court. Hence, petitioners can make only the weakest allegations of a conflict. They note that in *Antoine v. Washington*, 420 U.S. 194, 207-08 n.11 (1975), this Court did not reach the question of a tribe's hunting rights on private land under an 1891 agreement. But that obviously does not take away from what this Court did say in *Winans* and *Fishing Vessel* about fishing rights under the Stevens treaties.

By the same token, that the courts in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt ("LCO")*, 700 F.2d 341 (CA7 1983), and 760 F.2d 177 (CA7 1985), and *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904 (CA8 1997), *cert. granted on other grounds*, 118 S. Ct. 2295 (1998), found that, under the treaties before them, the Chippewa tribes do not have a right to exercise their rights on private property, says nothing about the proper construction of the Stevens treaties. Those cases simply do not enunciate a general principle that all Indian treaties preclude tribal access to private property; they very clearly limit their holdings to the treaties considered there.[21]

Finally, UPOW's claim that the decision below conflicts with a line of Washington cases beginning with *Sequim Bay Canning Co. v. Bugge*, 94 P. 922 (Wash. 1908), is frivolous. UPOW Pet. 20. Those cases merely hold that, under state law, the owners of private tidelands may exclude others from harvesting clams from their tidelands. They do not address the effect of the Stevens treaties on this general rule.[22] Indeed, the only reported Washington decision to address the

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[21] The treaty language, and the courts' findings of fact about the tribes' expectations for using private property, differ considerably. Neither the *LCO* nor the *Mille Lacs* treaties provide the treating tribes with a right to exercise their usufructuary rights at "all usual and accustomed grounds and stations." *See LCO*, 700 F.2d at 345; *Mille Lacs*, 124 F.3d at 910. Indeed, in neither *LCO* nor *Mille Lacs* did the plaintiff tribes even claim a right of access to private property. 700 F.2d at 364 n.14; 952 F. Supp. at 1376; 861 F. Supp. at 789 n.2.

[22] Nor do these cases, or other twentieth-century cases cited by petitioners, *see, e.g., McKee v. Gratz*, 260 U.S. 127 (1922), have any bearing on the understanding of the treaty terms prevalent in the mid-nineteenth century.

tribes' shellfishing rights is fully consistent with the decision below. *See Washington v. Courville*, 676 P.2d 1011 (Wash. Ct. App. 1983) (holding that shellfish fall within the right of taking fish).

B. The Equal Footing Doctrine

Petitioners also argue that, even if the treaty right of taking fish includes an entitlement to enter private property to exercise the right, the entitlement implicitly was abrogated under the Equal Footing Doctrine upon the admission of the State of Washington into the Union. Petitioners' argument does not present a conflict of authority or any other basis for certiorari, because in *Winans* this Court squarely decided the point, holding that the United States intended the Stevens treaty fishing right to bind the future State and to override the presumption of the Equal Footing Doctrine. That holding is dispositive here.[23]

The United States has always possessed the power to make pre-statehood conveyances of title "whenever . . . necessary to do so in order to perform international obligations . . . or to carry out other public purposes appropriate to the objects for which the United States holds the Territory." *Shively v. Bowlby*, 152 U.S. 1, 48 (1894). In *Winans*, this Court held that in the Stevens treaties the United States clearly intended to reserve to the tribes the ability to use private property to effectuate their fishing rights, and that an appropriate public purpose justified overcoming the equal footing presumption:

> The extinguishment of Indian title, opening the land for settlement and preparing the way for future States, were appropriate to the objects for which the United States held the Territory. And surely it was within the competency of the Nation to secure to the Indians such

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[23] Petitioners scarcely mention this basis for the holding of the court below. They argue instead that two independent grounds proffered by the Court of Appeals (that the treaties here involve a reservation rather than a grant of rights, and that the tribes are not claiming fee simple ownership of the tidelands) are in conflict with decisions of this Court and other Courts of Appeals. However, there is no occasion to examine those alternative grounds, for they make no difference to the outcome of this case. *Winans* controls.

> a remnant of the great rights they possessed as "taking fish at all usual and accustomed places." Nor does it restrain the State unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enables the right to be exercised.

198 U.S. at 384. Ever since *Winans*, the federal courts (including in the decisions ultimately upheld in *Fishing Vessel, see* 384 F. Supp. at 401) have consistently held the Equal Footing Doctrine not to affect the scope of the tribes' fishing rights, and state court decisions relying on the doctrine to that end have consistently been reversed. *See, e.g., Washington v. Tulee*, 109 P.2d 280 (Wash. 1941), *rev'd*, 315 U.S. 681 (1942).

Petitioners weakly suggest that *Winans* is not binding because this case involves shellfish rather than salmon. But they do not contest that the right of taking shellfish is part of the broader right of taking fish, and *Winans'* holding that the United States overrode the equal footing presumption so that the tribes could exercise their fishing rights is therefore squarely applicable. *Winans* admits of no distinctions in this regard between different types of fisheries, and the facts do not either. As the district court found (and as petitioners' own experts testified), the taking of salmon includes the extensive use of tidelands for "beach seines, tidal impoundment traps, stake nets and reef nets." App. 83. *See also* 384 F. Supp. at 352, 360-61, 370, 378. Indeed, as the treaties expressly provide, the fishing right even includes the right to "erect[] temporary houses for the purpose of curing" fish. These aspects of salmon fishing affect use of tidelands in ways similar to the taking of shellfish, particularly given the stringent limitations imposed below on tribal shellfishing on private tidelands.[24] The effect of the Equal

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[24] To the extent petitioners are arguing that shellfishing can be exempted from the *Winans* holding because the proviso makes the shellfishing right temporary, they are forced to ignore the findings of the courts below that the United States intended to guarantee to the tribes, and the tribes understood they were reserving, a permanent right of access to their natural shellfish beds, App. 27-28, 69-70, and that the proviso only precludes the tribes from harvesting shellfish from artificial beds created by settlers. App. 26, 77-78. For the same reason, the asserted rule of *Ward v. Race Horse*, 163 U.S. 504 (1896), and *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (CA10 1995), that under the equal footing

Footing Doctrine on the scope of the tribes' shellfishing rights is thus a "matter decided," and presents no basis for a grant of certiorari.

IV. The Court of Appeals Created No Conflict in Its Interpretation of the Shellfish Proviso.

A. The Court of Appeals Correctly Reviewed the Proviso Meaning *De Novo* and Subsidiary Facts for Clear Error.

Petitioners argue that the Court of Appeals did not review *de novo* the district court's conclusions regarding the meaning of the treaty shellfishing proviso and that this purported error brought it into conflict with the decisions of other circuits and of this Court. The Court of Appeals, however, expressly stated that it was conducting *de novo* review, App. 16, and its opinion bears that statement out. The court's conclusion was "that the district court's reasoned analysis of the Proviso *is correct*," App. 26 (emphasis added), not just that the analysis was not clearly erroneous. In explaining its decision, moreover, the court emphasized several points, reasoning that petitioners' interpretations of the proviso are "totally inconsistent" with the repeated promises made by the United States' negotiators to preserve the tribes' access to their fisheries, App. 27, and that petitioners' expansive reading of the proviso is flatly at odds with the "black-letter canon[]" that textual provisos are to be strictly construed. App. 28. Analysis of this sort is the hallmark of *de novo* review, and the premise of petitioners' argument therefore does not hold up.[25]

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presumption temporary and precarious treaty rights might vanish upon statehood, has no applicability to this case, even setting aside *Winans'* holding that the United States overrode the presumption in the Stevens treaties. Thus the *Repsis* court itself distinguished the Stevens treaties because of *Winans'* description of the fishing right as permanent and binding on the State. 73 F.3d at 991.

[25] Other portions of the decision below confirm that the Court of Appeals engaged in *de novo* review of the meaning of the proviso. Thus, it showed no deference in reversing the district court on the question whether the protections afforded to "citizens" by the proviso extend to the State. App. 35-36.

Petitioners attack the Court of Appeals' determination that it should "review for clear error all of the district court's findings of historical fact, including its findings regarding the treaty negotiators' intentions, [and that it would] then review *de novo* whether the district court reached the proper conclusion as to the meaning of the Shellfish Proviso given those findings." App. 16. However, none of the decisions cited by petitioners contains any statement at odds with this description of the proper standard of review – indeed, not one even discusses the standard of review appropriate in considering a district court's subsidiary "findings of historical fact." There simply is no conflict between the Court of Appeals' statement of law on this point and that found in any other cited decision.

Nor is there any error in the Court of Appeals' approach. Petitioners mistakenly assume that whenever an appellate court reviews a legal conclusion *de novo*, it should also review *de novo* all component parts of that conclusion. This is incorrect. This Court has repeatedly noted that even if a trial court conclusion is appropriately classified as one of law, an appellate court should review for clear error any subsidiary findings of historical fact.

In *Ornelas v. United States*, 517 U.S. 690 (1996), for example, this Court held that "determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal," but "hasten[ed] to point out that a reviewing court should take care . . . to review findings of historical fact only for clear error." *Id.* at 699. Similarly, in *Miller v. Fenton*, 474 U.S. 104 (1985), this Court held that while the voluntariness of a confession is a legal question subject to plenary federal review on habeas, "subsidiary factual questions, such as whether a drug has the properties of a truth serum or whether in fact the police engaged in the intimidation tactics alleged by the defendant, are entitled to [the presumption of correctness attaching to factual determinations]." *Id.* at 112 (citations omitted). Fed. R. Civ. P. 52(a) simply does not "exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous." *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982). This is no less true where a factual finding serves as a predicate to a legal conclusion reviewed *de novo*.

The decision below was fully consistent with these principles. In the district court, petitioners raised a host of factual allegations regarding the knowledge and intentions of the individual treaty negotiators. They asserted, for example, that the American negotiators lacked knowledge of the shellfish industry and in drafting the proviso would have looked instead to other "frontier contexts" like mining or agriculture. App. 59. They further asserted that even if the negotiators had known about the shellfishing industry, they would have distinguished between the east and west coast industries, and that there were no uniform industry practices regarding the staking or cultivating of beds. *See, e.g.*, Growers Pet. 5, 8. They likewise asserted that the Indian negotiators had no knowledge of shellfishing industry practices, uniform or not. *Id.* at 7. These were factual allegations, and after a three-week trial the district court rejected them all on the basis of "compelling and persuasive" evidence to the contrary. App. 55. In reviewing those claims on appeal, it was entirely appropriate for the Court of Appeals to show deference to the district court's findings of fact regarding them. Rule 52(a) dictated that it do no less.

Employing a deferential standard of review with respect to subsidiary factual findings is also fully consistent with this Court's decisions. Contrary to petitioners' repeated claims, for example, this Court in *Fishing Vessel* did not engage in a plenary review of disputed facts as to the knowledge and intentions of the Stevens treaty negotiators. Rather, it cited extensively to the district court's findings on those points and conducted its treaty interpretation on the basis of those findings. *See, e.g.*, 443 U.S. at 664-69, 676-77 (citing to the district court's findings for the proposition that "[c]ontemporaneous documents make it clear that [the negotiators] *recognized the vital importance of the fisheries to the Indians and wanted to protect them from the risk that non-Indian settlers might seek to monopolize their fisheries*" (emphasis added)).[26]

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[26] The Alexander petitioners cite to three other decisions of this Court, Alexander Pet. 27, but again there is no tension with the decision below. None of those decisions contains any standard of review discussion. Nor do there appear to have been any disputed issues of historical fact on which the lower courts had been required to make findings.

The Growers, meanwhile, cite to four court of appeals decisions to allege a conflict. In none of those cases, however, had the respective district courts resolved any disputed issues of historical fact, so these decisions provide no guidance as to the standard of review that the circuits would employ in such a situation.[27] Moreover, highly analogous cases from those circuits demonstrate that they would take the same approach as did the court below. Thus, while petitioners insist that treaties are just like statutes, they are in fact a combination of contract and statute, and both contractual and statutory principles of interpretation are applied to them.[28] *See O'Connor v. United States*, 479 U.S. 27, 33 (1986); *Fishing Vessel*, 443 U.S. at 675.

The universal rule with respect to contracts is that, where there are disputed issues of historical fact pertinent to determining the intent of the contracting parties, the trial court's resolution of those issues is reviewed for clear error. *See, e.g., National Union Fire Ins. Co. v. Circle, Inc.*, 915 F.2d 986, 989 (CA5 1990) ("[I]f the interpretation of the contract turns on the consideration of extrinsic evidence, *such as evidence of the intent of the parties*, the standard of review is clearly erroneous." (emphasis added)); *Scarborough v. Ridgeway*, 726 F.2d 132, 135 (CA4 1984) ("There are factual questions involving the interpretation of an agreement to which the not-clearly erroneous standard applies such as the intent of the parties in employing ambiguous language where the oral and documentary

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[27] Two of the cases involved appeals from summary judgment motions. *Rainbow Navigation, Inc., v. Department of Navy*, 911 F.2d 797, 800 (CADC 1990); *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1138 (CA3 1988). The other two involved appeals from motions to quash service of process where there were no factual issues relating to treaty interpretation presented. *Tabion v. Mufti*, 73 F.3d 535, 537 (CA4 1996); *Kreimerman v. Casa Veerkamp, S.A. de C.V.*, 22 F.3d 634, 636-37 (CA5 1994). While the courts of appeals in several of the cases engaged in some discussion of the treaty negotiating records, there does not appear to have been any dispute as to the contents of those records.

[28] Interpreting a treaty just like a statute would not change the outcome in any event. Where there is a factual controversy as to a legislature's intent the rule remains the same: the district court's conclusion on the subject is a factual determination subject to review for clear error. *See, e.g., Hunter v. Underwood*, 471 U.S. 222, 229 (1985).

evidence is conflicting."); *Washington Hosp. v. White*, 889 F.2d 1294 (CA3 1989) (same); *North Cent. Airlines, Inc. v. Continental Oil Co.*, 574 F.2d 582, 586-87 (CADC 1978) (same). The Ninth Circuit decision honored that rule here, and there is no conflict on which to base a grant of certiorari.

The Growers complain that deferring to subsidiary factual findings puts an appellate court in the position of automatically deferring on the ultimate issue of treaty meaning. This is not so. The Growers confuse a district court's findings regarding the treaty *negotiators'* knowledge and desires with the ultimate question of the *United States'* and the *tribes'* intent. In some cases the evidence regarding the former might be equivocal, and where the district court might draw one conclusion from that indeterminacy, an appellate court might as a legal matter draw another. In other cases, however, the findings might be so strong as to point reasonably only in one direction. This is such a case.

The district court found that the American treaty negotiators were familiar with the terms and practices of the shellfish industry as they prevailed on both the east coast and in the Washington Territory (indeed, George Gibbs' writings explicitly equate the two). App. 64-66, 71. It further found that the treating Indians had knowledge of those terms and practices by virtue of their exposure to them at Shoalwater Bay. App. 65-66. And it found that the choice of the term "beds staked or cultivated" in the shellfish proviso was no accident, but that "staked" and "cultivated" beds were widely understood to refer to beds of shellfish created by citizens where natural shellfish beds of that type did not exist. App. 77-78. These findings do strongly suggest the conclusion that the treaty prohibits tribal shellfishing only from artificial beds, but that the evidence here is so strong does not mean that a less deferential standard of review should be employed, any more than a different standard of review would be called for where a trial court determines that a confession was involuntary based on factual findings that a defendant had been tortured before confessing.

To the contrary, the weight of the evidence provides yet another reason for denying certiorari. The district court repeatedly described the proof in support of the tribes' interpretation of the proviso as "compelling and persuasive," App. 55, and the Court of Appeals was clearly of the same

view. App. 26. A ruling that the court below should engage in a plenary review of all factual matters would be highly unlikely to have any effect on the ultimate outcome.

B. The Proviso Meaning is a Unique, Factbound Issue Which the Courts Below Decided Correctly.

Petitioners argue to varying degrees that this Court should review the merits of the holdings below that the shellfish proviso prohibits tribal harvesting only from artificial shellfish beds. But that determination gives rise to no conflict and will have no impact beyond this case. There are no other Indian treaties containing language about shellfish beds.

The interpretation of the proviso language, moreover, is a heavily record-based inquiry. To reach their conclusions, the courts below engaged in a searching and detailed analysis of how the words of the proviso were understood and used at treaty times and how the parties acted subsequent to the treaties. They examined sources including industry treatises, newspaper and magazine articles, court decisions, legislation, the letters and journals of oystermen, the treaty records, and the writings of the treaty negotiators themselves, all of which consistently distinguished staked or cultivated from natural beds of shellfish, and they considered substantial expert testimony on the subject.

In short, the lower courts did as this Court instructed in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), and interpreted the treaty language "in light of the common notions of the day and the assumptions of those who drafted [it]." *Id.* at 206. They addressed the arguments raised by petitioners here, finding them insufficient to overcome the "compelling" App. 55, 59, and "overwhelming[]" evidence in support of the tribes' interpretation of the proviso. App. 78.[29] Petitioners' requests that this Court engage in the same

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[29] Petitioner's claims of error do not withstand even the slightest scrutiny. For example, they claim that the courts below should have limited their analysis to dictionary definitions, even though treaty-time dictionaries do not define staked or cultivated shellfish beds, and even though their own expert conceded that the negotiators drew the proviso's terms from the shellfish industry. App. 26; D-467 at 108. *See Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 537 (1991) (unanimous) ("dictionary definitions may be too general for purposes of treaty

heavily record-based and factbound inquiry already conducted by the two courts below betray a fundamental misunderstanding of this Court's role and do not present a basis for certiorari.

V. This Case Presents No Opportunity To Revisit Well-Settled Law Regarding Laches.

Following an unbroken line of precedent, the courts below held that the doctrine of "laches or estoppel is not available to defeat Indian treaty rights" in a case such as this. App. 28 (quoting *Swim v. Bergland*, 696 F.2d 712, 718 (CA9 1983), and citing *Board of County Comm'rs v. United States*, 308 U.S. 343, 350-51 (1939)). The Growers and the property owners challenge this holding (the State does not raise the argument), but allege no circuit split. Certiorari should be denied on this basis alone.

Pointing to the dissent in *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985), the Growers claim that uncertainty exists as to whether a tribe, proceeding *by itself*, may be subject to the bar of laches. Not only has the alleged uncertainty failed to create any circuit split, but in this case the United States has sued along with the tribes for vindication of the tribes' treaty rights. It is clear beyond cavil (and petitioners make no claim to the contrary) that the

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interpretation"). They argue that the proviso prohibits tribal harvesting from "any beds," as if the overwhelming evidence as to the meaning of the "staked or cultivated" modifier does not matter. They claim that the courts below relied on a technical interpretation of east coast shellfish law, when those courts canvassed a wide variety of non-technical materials showing that the American public in general, and the treaty negotiators in particular, were familiar with the terms and practices of the shellfish industry, and that the treating Indians understood those practices by virtue of their exposure to them at Shoalwater Bay. App. 26, 59-78. They argue that the courts should have deferred to a 1905 letter from the Commissioner of Indian Affairs, even though that letter does not discuss the proviso, had its reasoning rejected by *Winans* 45 days after it was written, and is in conflict with a Commissioner's opinion written closer in time to the treaties. ER 1161-63; App. 76-77. Finally, they argue that the holdings below render the proviso duplicative of the treaties' "usual and accustomed" limitation, when in fact the tribes' usual and accustomed grounds and stations are broad areas within which there exist many locations containing only artificial shellfish beds, which the tribes could harvest were it not for the proviso.

doctrine of laches does not apply to the United States acting in its capacity as trustee for the tribes. *Nevada v. United States*, 463 U.S. 110, 141-42 (1983); *Board of County Comm'rs*, 308 U.S. at 351; *United States v. Minnesota*, 270 U.S. 181, 196 (1926); *cf. United States v. California* 507 U.S. 746, 757 (1993). The position advocated by the Growers therefore has no relevance to the outcome of this case. The writ should be denied.

VI. Petitioners' Overstated Claims of Hardship Do Not Support a Rewriting of the Treaties.

Throughout their arguments, petitioners claim that the decisions of the courts below are highly unfair and will wield a devastating impact on them. While clearly designed to engender sympathy, these claims are both factually overblown and an inappropriate basis for certiorari.

First, it is impossible to square petitioners' claims of hardship with the holdings below. Thus, while the Alexander and UPOW petitioners allege that unfettered tribal access to their properties will cause them great inconvenience and emotional harm, they nowhere acknowledge the stringent limitations that the courts below imposed on such access in response to their concerns. The tribes may harvest shellfish from private tidelands only five days out of every year (with slight increases for large properties), and they may do so only after having given the owner at least a month's notice and after having conducted expensive surveys definitively quantifying the natural shellfish presence on those tidelands. App. 37-40, 126-27, 146. As a practical matter, then, the tribes who could once resort to their fisheries at will may now do so only under the most restrictive of conditions.

The Growers, meanwhile, complain that the decisions below will rob them of the "fruits of their labor." This is pure hyperbole. Under the Court of Appeals' decision the growers will never lose a single clam or oyster produced by dint of their effort or investment. The holding below unequivocally limits the tribes only to a share of those shellfish that would naturally exist without the growers' labor. App. 33-35.

The impact on the growers from having to share nature's shellfish has not been finally determined, as the Ninth

Circuit remanded to the district court the question of the natural productivity of the growers' beds. The tribes have already conceded, however, that virtually all of the growers' oyster and mussel beds are artificial, App. 106, exempting approximately 66% of the total value of the shellfish commercially harvested from Washington tidelands from any tribal share. PL-988, Tbl. 50. The remaining 34% of the commercial harvest is largely in the form of clams, and here again it is clear that much of the growers' production results from their efforts. The total tribal share of the natural production will therefore likely be very small compared to the growers' overall harvest.

Petitioners, of course, make no mention of the hardship and poverty suffered by the tribes because of years of exclusion from their fisheries. Even more fundamentally, petitioners' allegations of harm cannot serve as a basis for interpreting what the treaties mean. It is a cardinal rule that "even Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice." *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943). *See also Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 353 (1945). This rule is often applied to the detriment of Indian tribes; it applies with equal force when non-Indians seek to rewrite treaty terms to avoid a claimed injustice. This Court is simply not in the business of recrafting treaty promises that only Congress may amend, and petitioners' overstated claims of harm therefore do not create a basis for certiorari.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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MAR 2 1998

Nos. 98-1026; 98-1028; 98-1039; & 98-1052

In the

Supreme Court of the United States

October Term, 1998

STATE OF WASHINGTON,
Petitioners,

v.

UNITED STATES OF AMERICA, et al.,
Respondents.

(Additional parties listed on inside front cover.)

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS STATE OF WASHINGTON, 26 TIDELAND AND UPLAND PRIVATE PROPERTY OWNERS, PUGET SOUND SHELLFISH GROWERS, LARRY B. AND SHIRLEE ALEXANDER, AND WILLIAM AND CHARMOND ADKINS

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PUGET SOUND SHELLFISH GROWERS,

Petitioners,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

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26 TIDELAND AND UPLAND
PRIVATE PROPERTY OWNERS,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents

LARRY B. AND SHIRLEE ALEXANDER, *et al.*, and
WILLIAM AND CHARMOND ADKINS, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS STATE OF WASHINGTON, 26 TIDELAND AND UPLAND PRIVATE PROPERTY OWNERS, PUGET SOUND SHELLFISH GROWERS, LARRY B. AND SHIRLEE ALEXANDER, AND WILLIAM AND CHARMOND ADKINS

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully moves to file the attached brief amicus curiae.[1] Consent to file this brief has been granted by counsel for the United States, the Jamestown, Lower Elwah and Port Gamble Bands of S'Klallams, Nisqually, Nooksack, Skokomish, Squaxin Island, Upper Skagit, Sauk-Suiattle, and Stillaguamish Tribes, the Suquamish Tribe, the Makah Tribe, the Quileute Tribe, Puget Sound Shellfish Growers, Petitioners Adkins, 26 Tideland and Upland Private Property Owners (UPOW), Petitioners Alexander, the Yakama Indian Nation, and the State of Washington. The letters of consent received have been lodged with the Clerk of this Court. Requests for consent to file the amicus curiae brief were made to the other parties, but as of the date of filing this brief written responses from them have not been received.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation has participated in numerous cases before the United States Supreme Court involving the protection of private property rights. PLF attorneys were counsel of record in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 117 S. Ct. 1659 (1997), and PLF participated as Amicus Curiae in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987), *First English Evangelical*

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae affirms that no counsel for any party in this case authored this brief in whole or in part and, furthermore, that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987), *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), to name but a few. PLF participated as Amicus Curiae in this case both in the proceedings before the district court, as well as on appeal in the Ninth Circuit, and also filed an amicus brief in this Court in connection with another case interpreting the treaties at issue here, *State of Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, *modified sub nom.*, *United States v. State of Washington*, 444 U.S. 816 (1979).

Amicus seeks to augment Petitioners' arguments by arguing that this Court should decide the important question of whether the claims of the Tribes should be barred by the doctrine of laches, at least as to the right to take shellfish in private tidelands.[2] Not only do the equities weigh heavily in favor of thousands of private landowners, but previous decisions of this Court on laches do not address the unique circumstances of this case. Moreover, PLF is concerned that the Ninth Circuit's decision ignores the serious harm its decision will work on innocent property owners.

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[2] Both the Puget Sound Shellfish Growers and the Alexander/Adkins Petitioners have raised the issue of the application of laches in their petitions. *Puget Sound Shellfish Growers v. United States*, No. 98-1028, Petition at i; *Larry B. and Shirlee Alexander and William and Charmond Adkins v. United States*, No. 98-1052, Petition at 27.

For the foregoing reasons, PLF requests this Court to grant its motion to file the attached amicus curiae brief.

DATED: March, 1999.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

The interest of Amicus Curiae Pacific Legal Foundation (PLF) is set forth in the preceding motion.

INTRODUCTION

In this case, the Ninth Circuit has determined that a number of Indian tribes in Western Washington (Tribes) have extensive rights to cross privately owned uplands and to enter and harvest shellfish from privately-owned tidelands. The Ninth Circuit determined the Tribes reserved these rights under a series of treaties entered into by the Tribes and the United States in 1854 and 1855 despite the Indian tribes having asserted no claim for 135 years that they possessed such rights, and despite a proviso in the treaties that the Indians would not have any right to take shellfish from "any beds staked or cultivated by citizens."

The decision of the Ninth Circuit substantially and adversely affects private property rights in the State of Washington. As noted by Judge Beezer in his concurrence, "[p]roperty rights, which have been undisturbed for generations, are encumbered by our decision today." *United States v. State of Washington*, 157 F.3d 630, 659 (9th Cir. 1998), Appendix (App.) at 46 (*Shellfish III*).

Despite the generations-long delay in making any claim, and despite the severe disruption of long-held property rights, the Ninth Circuit held that under this Court's precedents, the doctrine of laches could not be applied to bar any tribal claims. However, this Court has never held that the doctrine of laches is unavailable as a defense to the assertion of all Indian treaty claims. In fact, this Court expressly declined to address the question in *County of Oneida v. Oneida Indian Nation of New York State*, 470 U.S. 226 (1985) (*Oneida*), although a strong dissent by four Justices argued that the doctrine of laches should be available as a defense where an Indian tribe had waited 175 years before bringing suit to avoid a conveyance of tribal land for valuable consideration.

Whether the doctrine of laches should be applied to bar long unasserted Indian treaty claims, especially where those are claims of reserved rights to fish, hunt, or harvest, is a question of nationwide importance. In recent years, various tribes around the country have sought to reassert claims to usufructuary rights in public and private rights and private property. Indeed, a case involving reassertion of Indian hunting and fishing rights under an 1837 treaty between the United States and the Chippewa is presently pending before this Court.[1] The Courts should have the power to apply the doctrine in appropriate circumstances, especially where, as here, the Tribes failed to assert their claims for an extended period and the claimed rights severely disrupt long-held property rights. Accordingly, the Court should grant the petitions to answer the important question it left open in *Oneida*.

STATEMENT OF THE CASE

A. Summary of Proceedings Below

In 1970, the United States and the Tribes filed a complaint against the State of Washington seeking a declaratory judgment interpreting the Tribes' treaty rights to fish for salmon and steelhead. The district court retained continuing jurisdiction of future unresolved issues arising out of the fishing provisions of the treaties. *United States v. State of Washington*, 384 F. Supp. 312, 327-28 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

On May 19, 1989, 16 of the Tribes began the subproceeding now before this Court by filing a "Request for Determination re: Shellfish." The Tribes' claim arises out of provisions of five treaties (Treaties) negotiated with the United States in 1854 and

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[1] *State of Minnesota v. Mille Lacs Band of Chippewa Indians*, No. 97-1337; *County of Aitkin v. Mille Lacs Band of Chippewa Indians* No. 97-1356, and *Thompson v. Mille Lacs Band of Chippewa Indians*, No. 97-1357.

1855.[2] Each of the Treaties contains substantially similar language stating that the Indians would continue to possess

> [t]he right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however*, that they shall not take shell fish from any beds staked or cultivated by citizens.

Treaty of Medicine Creek, December 26, 1854, 10 Stat. 1132, Art. III, App. at 170. On the basis of the language above, the Tribes claimed their fishing rights included a treaty right to harvest shellfish from all tidelands in Western Washington, including private and state owned tidelands, together with a right of access over upland properties to reach such tidelands. The district court initially determined that, under the Treaties, the Tribes were entitled to 50% of the shellfish harvest in Washington waters. *United States v. State of Washington*, 873 F. Supp. 1422 (W.D. Wash. 1994) (*Shellfish I*).

The district court then conducted an implementation trial. In its resulting decision, the court noted that

> [t]he Shellfish Growers and Private Property Owners are, effectively, innocent purchasers who had no notice of the Tribes' Treaty fishing right when they acquired their property. Indeed, many of these Growers and

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[2] Treaty of Medicine Creek, December 26, 1854, 10 Stat. 1132, App. at 169 ; Treaty of Point Elliott, January 22 1855, 12 Stat. 927, App. at 177; Treaty of Point No Point, January 26, 1855, 12 Stat. 933, App. at 187 ; Treaty with the Makah, January 31, 1855, 12 Stat. 939, App. at 195; and Treaty of Olympia, July 1, 1855, 12 Stat. 971, App. at 203. These treaties are also collectively referred to as the "Stevens Treaties," territorial Governor Isaac Stevens having negotiated the treaties on behalf of the United States.

> Owners purchased their land at or before the turn of the century, and they reasonably believed the land to be free of encumbrances and servitudes. Their belief was reinforced by the Tribes' failure to formally assert the Treaty right until over 100 years after the Stevens Treaties were signed.

United States v. State of Washington, 898 F. Supp. 1453, 1457 (W.D. Wash. 1995) (*Shellfish II*), App. at 97.

The decisions of the district court were appealed. Like the district court, the Ninth Circuit recognized that "the equities do weigh heavily in favor of the Growers' argument—the Tribes waited 135 years to assert their shellfishing rights." *United States v. State of Washington*, 157 F.3d at 649, App. at 28. Nevertheless, the Ninth Circuit rejected arguments that the equitable doctrine of laches should be applied to defeat the Tribes' claim to shellfish. The Ninth Circuit, while recognizing "the enormous impact our decision will have on the thousands of homeowners, Tribal members, and commercial fishermen in the Puget Sound region," 157 F.3d at 657, App. at 42, still held that the Tribes have Treaty rights to take 50% of shellfish on all Washington tidelands, including those in private ownership. *Id.* at 646-47, App. at 45-48.

On private tidelands, the Tribes are authorized to enter to conduct surveys of the claims and then may enter those private lands and take 50% of the clams and oysters, subject to "time, place and manner" restrictions. A limited exception is made for artificially cultivated beds. *Id.* at 653, App. at 38.

B. History of the Treaties and of the Shellfishing Industry in Washington

As noted by this Court in *State of Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979), the United States entered into the Treaties "[t]o extinguish the last group of conflicting claims to lands lying west of the Cascade Mountains and north of the Columbia

River in what is now the State of Washington." *Id.* at 661. As a result, "[t]he Indians relinquished their interest in most of the Territory in exchange for monetary payments." *Id.* at 662.

In return for the absolute conveyance of their aboriginal title to the United States, the Tribes received annual payments from the United States. Treaty of Medicine Creek, 10 Stat. 1132 App. at 169, Art. 4; App. at 171. The Indians also reserved certain rights including the right to hunt, fish, and gather as set forth above.

As demonstrated by the record below, Washington has had a long history of treating tidelands and their shellfish resources as private property, which was understood both by the Indians and by the white settlers. As noted in an earlier case interpreting the Treaties, the Indians traditionally recognized shellfish as property which could be exclusively possessed:

> The record establishes that the Indians recognized exclusive property interests in land and in sedentary resources. However, the Indians viewed migratory fish and animals differently from stationary ones. The right to take fish existed when, and only when, the fish were within or passing through a tribe's particular territory. . . . Indians considered shellfish, as sedentary creatures, to be the exclusive province of the tribe within whose territory they were located.

United States v. State of Washington, 506 F. Supp. 187, 199-200 (W.D. Wash. 1980), *aff'd in part, rev'd in part*, 694 F.2d 1374 (9th Cir. 1982), *on rehearing*, 759 F.2d 1353 (9th Cir. 1985), *cert. denied*, 474 U.S. 994 (1985). The Indians also understood the settlers' concept of private property as the right to exclude others from land and the resources on it. Exhibit D-064 at 345-46 (typescript of "Records of the Proceedings of the Commission to Hold Treaties with the Indian Tribes in Washington Territory and the Blackfoot Country," from December 7, 1854 - June 11, 1855, by E.G. Swindell, Jr. (Los Angeles, CA 1942)); Exhibit D-473 at 50-51 (Dr. Daniel

Boxberger, *The Ethnohistory of Western Washington Indians in the Nineteenth Century with Reference to Shellfish Use and Control* (May 1993)).

After ratification of the Treaties, various settlements including the Cities of Seattle, Tacoma, Bellingham, and Port Townsend grew on tidelands containing shellfish beds which had been used by local tribes. Exhibit D-470 at 19-28. In 1864, the territorial legislature granted commercial shellfish growers exclusive rights in natural oyster beds in southern Puget Sound. App. at 63 n.11; Transcript at 1936-37.

In 1879, the legislature gave citizens the right to claim up to ten acres of any newly discovered oyster beds. Session Laws of the Territory of Washington 118-20 (1879). Starting in 1889, the legislature authorized the sale of tidelands "for commerce, trade or business." Washington Laws 1895, ch. 178, §§ 54 and 62; Washington Laws 1889-90 at 431. And in 1891, the Washington Supreme Court recognized the state's "full power to dispose of [tidelands] subject to no restrictions save those imposed upon the legislature by the constitution." *Eisenbach v. Hatfield*, 2 Wash. 236, 245, 26 P. 539 (1891).

The Tribes understood that they permanently lost access to shellfish beds when settlers exercised their right to stake or cultivate such beds. Transcript at 431-34. Indeed, prior to this case, in the litigation involving the Tribe's right to take anadromous fish, the Tribes and their experts agreed that their rights to shellfish were subject to termination when staked or cultivated. One of the Tribes' expert witnesses, Dr. Barbara Lane, had testified that the Indians understood they could lose a "treasured shellfish bed" because settlers could stake or cultivate such beds "anywhere." *See* Puget Sound Shellfish Growers' Excerpt of Record (GER) at 17. And the Suquamish Tribe admitted in its brief to the Ninth Circuit that "[u]nlike the in common shellfish right, the in common salmon right is not defeasible by staking or cultivating." GER at 2.

In 1905, the federal Commissioner of Indian Affairs ruled that the Treaty of Point Elliott did not prevent the State of Washington from granting a lessee of its tidelands the right to exclude Indians from taking clams, even though "the clam beds in question have never been cultivated." App. at 212. In 1908, the Washington Supreme Court similarly ruled that these lessees could enjoin all persons including Indians from taking clams from the leased tidelands because the clams "live, not merely upon, but actually, within, the land [and] . . . in a very material sense, belong with the land." *Sequim Bay Canning Company v. Bugge*, 49 Wash. 127, 131, 94 P. 922 (1908).

Today, there are thousands of owners of uplands who also own the adjacent tidelands. There are approximately 150,000 private titles potentially affected by the Ninth Circuit's decision. Transcript of Proceedings, May 12, 1995, at 838, App. at 14.

The allocation of 50% of the harvest to the Tribes has a severe impact on private tideland property. A real estate appraiser with expertise in waterfront properties concluded that property values would be diminished by as much as 40% as a result. Transcript of Proceedings, Vol. 11, May 2, 1994, at 2158-66. Additionally, the allocation makes profitable shellfish harvest unfeasible for small shellfish growers. Transcript of Proceedings, May 12, 1995, at 848.

The decision potentially could also have a devastating impact on Washington's commercial shellfish industry in general. As noted by Judge Beezer in his concurrence:

> The burden imposed by our opinion cannot be overstated. The record in this case makes abundantly clear that since treaty times a vibrant shellfish industry has developed in the State of Washington along the saltwater beaches of the Pacific Ocean and along tidelands adjoining the inland waters of Puget Sound.
>
> . . .

> The tension between grower and Indian under treaty provisions is clear. One will not grow shellfish on lands bearing natural shellfish to provide subsistence to the other without compensation for the damage occurring to the cultivated shellfish.

Shellfish III, 157 F.3d at 658-59, App. at 44-45.

SUMMARY OF THE ARGUMENT

The Court should grant the petitions to address the undecided, but important question whether the doctrine of laches is applicable to bar long-unasserted Indian treaty rights to harvest shellfish from private tidelands. Thousands of innocent private property owners will suffer serious harm if the Tribes, after 135 years of inaction, are allowed to reassert shellfishing rights.

In holding that the doctrine of laches was unavailable to bar such claims, the Ninth Circuit relied upon its prior decision in *Swim v. Bergland*, 696 F.2d 712 (9th Cir. 1983), which in turn rested on this Court's decision in *Board of Commissioners of Jackson County v. United States*, 308 U.S. 343 (1939) (*County Commissioners*). *County Commissioners*, however, as well as other decisions of the Court holding that the doctrine of laches would not apply to bar Indian claims, can be readily distinguished from the situation here. Those decisions involved specific rights, immunities, or restrictions imposed by the United States upon tribes or tribal members, rather than reserved usufructuary rights.

Application of laches to such usufructuary rights is an important question raised by the decision below. Not only has it not been addressed by the Court, but it has significant nationwide importance, given the potential for reassertion of long-dormant usufructuary rights purportedly reserved in many other Indian treaties.

ARGUMENT

I

THE COURT SHOULD GRANT THE PETITIONS TO DECIDE FOR THE FIRST TIME THE IMPORTANT QUESTION OF WHETHER THE DOCTRINE OF LACHES IS APPLICABLE TO BAR OR LIMIT THE TRIBES' 135 YEAR DORMANT CLAIM TO TAKE SHELLFISH FROM PRIVATE TIDELANDS

This case raises an important question never before addressed by the Court. It is time to do so. In the past the Court has recognized that laches cannot apply where federal statute or treaty provisions specifically prohibit an action with regard to Indian lands, but this case raises a completely new question.

Nevertheless, the Ninth Circuit held that the doctrine of laches was not available to bar or limit the Tribes' claims in this case. While that court conceded that "the equities do weigh heavily in favor" of application of the doctrine because the Tribes waited 135 years to assert their shellfishing rights, the court did not consider application of the doctrine because its prior opinion in *Swim v. Bergland*, 696 F.2d at 718, had held that "[l]aches or estoppel is not available to defeat Indian treaty rights." *Shellfish III*, 157 F.3d at 649, App. at 28. The holding in *Swim* ostensibly rested on this Court's opinion in *Board of Commissioners of Jackson County v. United States*, 308 U.S. at 350-51.

An examination of *County Commissioners* demonstrates that this Court's holdings in that case are based on a very different situation of fact and law, one easily distinguishable from the present case. *County Commissioners*, as well as similar Supreme Court cases, all deal with the situation where specific rights, immunities, or restrictions have been *granted or imposed by the United States* upon tribes or tribal members. Thus in *County Commissioners*, what was at issue was a specific provision in the treaty with the Pottawatomies in which the United States provided that lands held in trust by the United

States for these Indians would be exempt from state taxation. 308 U.S. at 348. Thus, this Court could say with authority that "state notions of laches and state statutes of limitations have no applicability," and "the immunity of the sovereign from these defenses is historic. Unless expressly waived, it is implied in all federal enactments." *Id.* at 351.

The same analysis holds true in other opinions of this Court where the defense of laches was determined to be inapplicable. For example, in *Ewert v. Bluejacket*, 259 U.S. 129 (1922), the heirs of Charles Bluejacket, a full-blood Quapaw Indian, sought to have the courts void a deed by him to Paul Ewert. At the time of the challenged conveyance, Ewert was a special assistant to the Attorney General of the United States with the obligation to assist in the institution and prosecution of suits to set aside deeds to certain allotments in the Quapaw Indian Agency. *Id.* at 134. At the time of the conveyance a federal statute provided that

> [n]o person employed in Indian affairs shall have any interest or concern in any trade with the Indians, except for, and on account of, the United States.

Id. at 135. This Court upheld the lower court's voiding of the deed because of the specific statutory prohibition and further held that the doctrine of laches was not applicable where there is a specific federal statutory prohibition on alienation of Indian title:

> [T]he equitable doctrine of laches, developed and designed to protect goodfaith transactions against those who have slept upon their rights, with knowledge and ample opportunity to assert them, cannot properly have application to give vitality to a void deed and to bar the rights of Indian wards in lands subject to statutory restrictions.

Id. at 138.

Similarly, in *Oneida* it was again Indian title which had been conveyed despite express federal statutory prohibitions. The

Oneida Indian Nation sought to recover damages for the use and occupation of 100,000 acres of its tribal lands which it had conveyed to the State of New York in 1795. The conveyance occurred despite the provisions of the federal Trade and Intercourse Act of 1793, which provided in pertinent part that

> no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution . . . [and] in the presence, and with the approbation of the commissioner or commissioners of the United States.

1 Stat. 330, § 8 (1793).

The Court stated that it would not consider application of the equitable doctrine of laches for two reasons. First, *Oneida* had been brought as an action at law for damages. Second, like *Ewert*, it involved questions of conveyance and extinguishment of Indian title in violation of specific federal statutory law. 470 U.S. at 244 n.16. Nevertheless, the four dissenting Justices in *Oneida* believed that where claims had been allowed to languish for 180 years, a federal common law concept of laches should be applicable to bar even claims of improper alienation of Indian title.

Unlike *Oneida*, the case before this Court has been maintained as an equitable action in which the Tribes have sought to enjoin the alleged interference with their reserved fishing rights under the Treaties. It also does not involve questions of improper alienation of Indian title, because that title was validly conveyed to the United States under the Treaties. Each one of the Treaties expressly provides that the Tribes shall

> *cede, relinquish, and convey to the United States, all their right, title, and interest in and to the lands and country occupied by them.*

Treaty of Medicine Creek, 10 Stat. 1132, App. at 169. Instead, this case involves the equitable interpretation and enforcement of the Tribes' reserved shellfishing rights. Thus, the situation is the paradigm of issue left open in *Oneida* and is in need of resolution by this Court.

In the present case, not only do we have a lapse of 135 years before the Tribes took any action to claim fishing rights in private shellfish lands, the interest they seek to vindicate is much more ephemeral than those previously at issue in the Court's jurisdiction.[3] Further, prior to this litigation the Tribes had never engaged in any action that would have put a reasonable person on notice of their claim. This Court has defined laches as follows:

> [T]he question of laches turns not simply upon the number of years which have elapsed between the accruing of . . .rights, whatever they were, and . . . assertion of them, but also upon the nature and evidence of those rights, the changes in value, and other circumstances occurring during that lapse of years. The cases are many in which this defense has been invoked and considered. It is true, that by reason of their differences of fact no one case becomes an exact precedent for another, yet a uniform principle pervades them all. They proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper

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[3] In other words, in cases like *County Commissioners*, *Ewert*, and *Oneida*, the existence and extent of the right or prohibition can easily be determined by review of the applicable federal statutory provision. Here, as a practical matter, one can only be put on notice of the claimed right by actual and repeated exercise by the Tribes, which did not occur. Also, unlike Indian title, fishing and hunting rights on ceded land are not part of a Tribe's reserved sovereignty, but instead are lesser rights subject to regulation by the States. *Cf.*, F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW (1942) at 335.

> forum; *that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned*; and that because of the changing condition or relations during this period of delay it would be an injustice to the latter to permit him now to assert them.

Galliher v. Cadwell, 145 U.S. 368, 371-72 (1892) (emphasis added).

Whether Indian rights have effectively been abandoned is an important question that this Court has considered in a number of its cases. In *Mitchel v. United States*, 34 U.S. (9 Pet). 711, 746 (1835), this Court stated:

> Indian possession or occupation was considered with reference to their habits and modes of life; their hunting-grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way, and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals. In either case their right became extinct.

Similarly, in *Williams v. City of Chicago*, 242 U.S. 434, 437 (1917), this Court stated:

> If in any view [the Pottawatomie Nation] ever held possession of the property here in question, we know historically that this was abandoned long ago and that for more than a half century [the tribe] has not even pretended to occupy either the shores or waters of Lake Michigan within the confines of Illinois.

This Court has also engaged in a similar analysis when previously construing fishing rights under the Stevens Treaties. In *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, the Court noted that a Tribe's right to an allocation of anadromous fish could be

reduced if "it should find other sources of support that lead it to abandon its fisheries." *Id.* at 687. And in *Seufert Brothers Company v. United States*, 249 U.S. 194 (1919), this Court emphasized the fact that the tribe had continuously asserted a right of access to a traditional fishing area. There, the United States sought to restrain interference with Yakima Nation tribal members' rights to fish in a specific locality on the Oregon bank of the Columbia River, and the right to get access to this area through private property. This Court noted that "[d]uring all the years since the treaty was signed [the Indians] have been accustomed habitually to resort for fishing to the [Oregon side of the river]." *Id.* at 198. In upholding the lower court's ruling for the Indians, this Court stressed that the only "servitude" that existed was where there had been a "habitual" and "open and notorious" use of the property by the Indians:

> The suggestion, so impressively urged, that this construction "imposes a servitude upon the Oregon soil," is not alarming from the point of view of the public, and private owners not only had notice of these Indian customary rights by the reservation of them in the treaty, *but the "servitude" is one existing only where there was an habitual and customary use of the premises, which must have been so open and notorious during a considerable portion of each year that any person, not negligently or wilfully blind to the conditions of the property he was purchasing, must have known of them.*

Id. at 199 (emphasis added).

Like *Seufert*, the Ninth Circuit's decision here has effectively created a servitude on privately owned land but, unlike this Court in *Seufert*, the Ninth Circuit failed to adequately address the history of use which would indicate whether the rights had been abandoned by the Tribes, much less whether there had been the "habitual," "customary," and "open and notorious" use since treaty time required by *Seufert*. As a result, a floating easement, uncertain in extent and nature, now exists on tens of

thousands of acres of private property, a servitude that no private landowner could have known existed prior to the lower courts' rulings.[4]

Additionally, the Tribes took no action for 135 years to assert a claim to these rights, despite longstanding knowledge that both federal and state officials, as well as the state courts, had declared that no such rights existed. The Tribes' delay is further compounded by the fact that they may well have had a remedy at law for compensation from the United States, either under the Indian Claims Commission Act (ICCA), 25 U.S.C. § 70 for claims arising up to 1946 or under 28 U.S.C. § 1505 for post-1946 claims.[5] For example, many of the actions complained of by the Tribes actually were implemented by acts of the territorial legislature permitting private claims and ownership of natural shellfish beds. In 1905, the federal Commission of Indian Affairs declared that the State of Washington had the right to exclude Indians from taking clams from tidelands. The ICCA applies to all treaty claims including fishing and hunting rights. *See Navajo Tribe of Indians v. State of New Mexico*, 809 F.2d 1455, 1464-67 (10th Cir. 1987).

PLF submits that given the long inaction of the Tribes which signaled abandonment of any rights, the reasonable reliance of thousands of private property owners who have purchased, occupied, and used tidelands for generations, and the serious

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[4] Also *cf.* Solicitor General Hoyt's statement in *United States v. Winans*, 198 U.S. 371 (1905), that "[w]e are not seeking to impress a broad and vague servitude on all patented lands along the Columbia, but only a clear and limited one on this particular small tract." 198 U.S. at 373.

[5] The United States Court of Federal Claims shall have jurisdiction of any claims "against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians . . . whenever such claim is one arising under the Constitution, laws or treaties of the United States or Executive orders of the President." 28 U.S.C. § 1505.

damage that will be done to private property rights, this case presents the appropriate situation for this Court to address whether the doctrine of laches should be applied.

II

THE COURT SHOULD GRANT THE PETITIONS BECAUSE APPLICATION OF LACHES IS ESPECIALLY PERTINENT WHERE THE TRIBES' PAST AND PRESENT DECISIONS NOT TO ASSERT THEIR CLAIMS AGAINST THE UNITED STATES NOW WORK UNFAIRLY TO SHIFT LIABILITY FOR SUCH CLAIMS FROM THE UNITED STATES TO INNOCENT PRIVATE LAND OWNERS

This case raises a serious question that should be addressed by this Court. Should laches apply to tribal claims that seek a remedy not against culpable governmental entities, but instead against innocent private property owners? In this case, both the district court and the Ninth Circuit recognized that thousands of private property owners are the innocent parties who will suffer the brunt of the impact of the courts' decision. The district court specifically found that

> Shellfish Growers and Private Property Owners are, effectively, innocent purchasers who had no notice of the Tribes' Treaty fishing right when they acquired their property. Indeed, many of these Growers and Owners purchased their land at or before the turn of the century, and they reasonably believed the land to be free of encumbrances and servitudes.

Shellfish II, 898 F. Supp. at 1457. The reasonable belief of private property owners was reinforced by the Tribes' long-standing failure to take any action to assert a claim to shellfish on this land: "Their belief was reinforced by the Tribes' failure to formally assert the Treaty right until over 100 years after the Stevens Treaties were signed." *Id.* The district court found that fault, if any, for creation of the situation lay with the State of Washington and the United States, not with private owners:

"Fault for creating this controversy lies squarely with the State of Washington and the United States, for selling the tidelands and not objecting to the sale, respectively." *Id.* at 1459.

Nevertheless, the United States appears in this action as a Plaintiff, ostensibly acting on behalf of the Tribes. The United States has taken this position despite the fact that it also possesses tidelands suitable for shellfishing,[6] and despite the fact the district court determined that it, and not private landowners, was in part responsible for any violation of the Tribes' treaty shellfishing rights. *Shellfish II*, 898 F. Supp. at 1459. Moreover, the United States only supported the Tribes' claim once it was clarified that the Tribes were not including federal tidelands.[7]

Alignment of the United States as a Plaintiff, rather than as a Defendant, raises important issues relevant to the laches question. As noted above, the Tribes possessed the right to assert claims for monetary compensation against the United States under the ICCA, as well as under 28 U.S.C. § 1505. The selective decision by the Tribes not to assert claims against the United States obviated the need for the United States to raise an obvious federal defense to the assertion of such claims: that the Tribes' remedy is not a suit for specific enforcement but, rather, an action for compensation either before the Indian Claims

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[6] PLF notes that if shellfishing claims are barred as to private lands, that does not necessarily mean that all shellfishing rights under the Treaties cease. At the present time, 53% of the tidelands are privately owned and 47% are either present reservation lands or public lands within the control of either the State of Washington or the United States. Exhibit US-181.

[7] As noted in the petition of 26 Tideland and Upland Private Property Owners (UPOW), the Tribes initially asserted their claim against all private and public tidelands. Later, after the United States supported the Tribes' claim, the Tribes clarified that they were not including federal tideland ownership within their claim. UPOW petition at 5-6.

Commission under the ICCA or a suit in the Court of Federal Claims under 28 U.S.C. § 1505.

Second, the decision by the Tribes not to assert claims against the United States and the United States' corresponding support of the Tribes in this action served to shift the burden to private landowners to "compensate" the Tribes for any wrongdoing of the United States. In other words, not only has the question of federal monetary compensation been avoided, under the lower courts' decisions, the potential obligation of the United States to make all of its own tidelands available for tribal shellfishing has now been transferred to, and is borne instead by, private landowners as well as the State of Washington.

The resulting situation is much akin to the "off-budget" transfers questioned by Justice Scalia in *Pennell v. City of San Jose*, 485 U.S. 1, 22 (1988). In that case, Justice Scalia noted there would be little public support if a measure requiring landlords to subsidize "hardship tenants" were instead structured to provide monetary subsidies to those tenants from public funds. The unfairness is even more evident here. It is impossible to conceive that Congress through legislation could dictate the result the United States and the Tribes have achieved indirectly here: requiring private shoreline owners to open their lands and make their shellfish resources available to the Tribes in order to preserve the federal government's own tideland property from those same treaty obligations. Such a direct measure also would pose serious constitutional questions since it would be an obvious example of "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The question of whether to apply laches is especially pertinent under these circumstances. Accordingly, the Court should grant the petitions.

III

WHETHER LACHES IS AVAILABLE TO BAR LONG-UNASSERTED TRIBAL USUFRUCTUARY RIGHTS IS A QUESTION OF NATIONWIDE IMPORTANCE

While they vary as to their specific provisions, many Indian treaties provide that the Indians reserve certain hunting and fishing rights in lands ceded to the United States. *See, e.g.*, F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW (1942) at 285 n.171 (listing such treaties entered into between 1789 and 1864). In many cases these rights have not been exercised, especially where such lands were subsequently acquired and utilized by settlers and have been treated as private property for generations. The loss of property rights suffered by innocent Puget Sound property owners as a result of a retroactive treaty interpretation by the courts below creates a precedent that could be used to cause similar suffering by property owners in many other parts of the country as well.

The Court has long recognized that claims, especially those affecting property rights, should be asserted within a reasonable time. "The best interests of society require that causes of action should not be deferred an unreasonable time. This remark is peculiarly applicable to land titles." *Lewis v. Marshall*, 30 U.S. (5 Pet.) 470, 472 (1831). While "it is well established that treaties should be construed liberally in favor of the Indians," *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943), this should not work to reward those who have slept on their treaty rights.

A question of nationwide importance has accordingly been raised by the petitions. The question is whether laches is available to bar long-unasserted tribal usufructuary rights that if upheld will cause innocent landowners to lose significant private property rights. The Court should grant the petitions and address this question.

CONCLUSION

For the foregoing reasons, this Court should grant the petitions to consider the laches issue left open in *Oneida*. The need for such consideration here is great. The damage that will be done to private property rights if the Ninth Circuit's decision is allowed to stand will be tremendous. Rights which thousands of property owners for generations believed in good faith they possessed will be nullified, including the right to exclude others traditionally held by this Court to be "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Loretto v. Teleprompter Manhattan CATV Corporation*, 458 U.S. 419, 433 (1982).

DATED: March, 1999.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1998

STATE OF WASHINGTON,
Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICI CURIAE OF INNER SOUND CRAB ASSOCIATION, JOE VERDOES, AND WASHINGTON DUNGENESS CRAB FISHERMEN'S ASSOCIATION, TOM KELLEY, IN SUPPORT OF PETITIONER, STATE OF WASHINGTON

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CORPORATE DISCLOSURE STATEMENT

There are no parent corporations or affiliates to these Associations which have issued shares to the public.

The Inner Sound Crab Association is a non-profit Washington corporation. Its membership includes major elements of the commercial dungeness crab fishing industry that concentrates its fishing in the waters of Puget Sound.

The Washington Dungeness Crab Fishermen's Association is also a non-profit Washington corporation. Its membership includes major elements of the commercial dungeness crab fishing industry off the coast of Washington.

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BRIEF AMICI CURIAE OF INNER SOUND CRAB ASSOCIATION, JOE VERDOES, AND WASHINGTON DUNGENESS CRAB FISHERMEN'S ASSOCIATION, TOM KELLEY, IN SUPPORT OF PETITIONER, STATE OF WASHINGTON

INTEREST OF AMICI CURIAE [1]

> In twenty-five years, the sea changes, in terms of what creatures are scarce or plentiful in Puget Sound, the technology changes, in terms of how practical it is to fish for one or another creature, and the market changes, in terms of how interested Japanese or American consumers may be in the catch. The eleven-year old child of a halibut fisherman when this lawsuit started in 1970 may now be the thirty-six year old skipper of a crab boat, with a different kind of participation in the industry and different economic interests than his father's. Where a federal district court makes itself a permanent regulatory agency for an industry, it ill behooves the judiciary to exclude people who earn their living in the industry from being heard on how they shall be regulated, on the ground that they did not complain about other decisions at an earlier time.

United States v. Washington, 86 F.3d 1499, 1508 (9th Cir. 1996) (Kleinfeld, J., dissenting). *See Amici* Add. at 3a-4a.

A. The Inner Sound Crab Association (ISCA) (Puget Sound).

ISCA is a non-profit Washington corporation. Mr. Joe Verdoes is the elected President of the Association. ISCA includes, in its membership, all major elements of the

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[1] Pursuant to S. Ct. Rule 37.6, this brief was authored, in its entirety, by counsel for *Amici Curiae*, Inner Sound Crab Association and Washington Dungeness Crab Fishermen's Association. No other person or entity other than *Amici Curiae* made any monetary contribution to the preparation or submission of this brief.

The written consent of all parties is submitted with this brief.

non-treaty commercial dungeness crab fishing industry within Puget Sound. There are approximately 220 persons holding commercial crab limited entry licenses for these areas. The Crab License Moratorium Law, RCW 75.30.130, prohibits new recruitment to the industry. The majority of the active fishermen were members of ISCA before this litigation. Some Indian crab fishers also participated in the fishery under more or less uniform regulations. Because limited entry permits for the fishery were transferrable, those permits had real and substantial value. In light of the recent rulings, the income generated under each permit has declined significantly.

ISCA members have small family businesses. Fishermen make a significant investment to participate in the Puget Sound commercial dungeness crab fishery. Most have invested tens of thousands of dollars in their vessels, necessary crab pots and related gear (some more than $100,000). In the 1990's, their livelihood and that of their families and their small coastal communities has depended largely upon this fishery, particularly because of the fate of salmon in the Washington area.[2]

The dungeness crab season for licensed commercial fishermen ordinarily runs from October 1 through April 15 in Puget Sound. In Puget Sound, the majority of dungeness crab molt in late spring. Molting crab are subject to increased mortality if handled before their shells harden in late summer (as is now the case for treaty fishers who target the crab during the molting season). The fall opening is scheduled to assure that the crabs are filled with meat and have attained their highest market-

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[2] Many coastal fishing communities are, by definition, single industry communities. As a result, the burdens imposed by this case will not be shared by all citizens of the State. Instead, they are borne by association members (and other fishers) and these small communities. As a practical matter, they have no real voice in the political process.

ability and resistance to handling mortality before the season.

A majority of the Puget Sound dungeness crab are taken in the first few weeks of the season. This crab fishery, because of its local resident nature, requires a management plan that makes uniform regulation its guiding principle.[3]

Treaty fishers in Puget Sound dispute established biology with respect to crab molting mortality. Accordingly, the treaty season is all year long (and exclusive in some areas). This "co-management" has resulted in a decrease in ISCA income of approximately sixty percent (60%) per permit.

B. Washington Dungeness Crab Fishermen's Association (WDCFA) (Coastal and Adjacent Waters of Pacific Ocean).

WDCFA is also a non-profit Washington corporation. Mr. Tom Kelley is the President of the Association. WDCFA includes all major elements of the commercial dungeness crab fishing industry off the coast of Washington. There are approximately 240 non-Indian commercial crab fishermen harvesting dungeness crab in this ocean area. A substantial number of these active fishermen are members of WDCFA. In 1995, the State of Washington passed legislation limiting entry into the coastal dungeness crab fishery effective January 1, 1995. RCW 75.30.350. The limited entry licenses are transferrable and have a market value. Although only few transfers occur, the value of the license is substantial. In light of the ruling of the Ninth Circuit, license values have declined. Fishing seasons have faced increasing restrictions.

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[3] The marketing of a substantial amount of undersized crab has recently been documented and confirmed in the State of Hawaii and in the State of Washington. Everyone agrees that such a practice will rapidly destroy the crab fishery. To date, non-treaty crabbers have not been implicated in the investigation.

As in ISCA, most WDCFA members have participated in the commercial crab fishery off the coast of Washington for decades. Many have participated in the fishery for generations. Their livelihoods have also become particularly dependent upon this fishery because of the fate of salmon in the Washington area. Moreover, the nature of the industry in these coastal waters requires significant investments in vessels and necessary crabbing equipment, often hundreds of thousands of dollars. Several families and their resources are dependent on the operation of these businesses.

In coastal waters, as in Puget Sound, the dungeness crab stock is a resident population. In coastal waters, the crab mature at three to four years. The traditional coastal dungeness crab season for licensed commercial fishermen runs from December 1 through September 15 of each season. In these waters, the fall closure is necessary because most dungeness crab molt in late summer and are subject to increased mortality if handled before their shells harden in mid-winter. The December 1 opening is scheduled to assure that crabs are filled with meat and have obtained their highest marketability and resistance to handling mortality before fishing begins. In other words, the coastal crab season differs from the Puget Sound season because crab in Puget Sound molt earlier.

As in Puget Sound, this crab fishery, because of its local resident nature and fluctuating returns of harvest, also requires a management plan of uniform regulations.

C. ISCA and WDCFA's Participation in This "Shellfish" Sub-Proceeding.

In 1991, sixteen Indian tribes with reservations on Puget Sound were permitted to bring a sub-proceeding seeking a right to harvest shellfish throughout Puget Sound. The background for shellfish litigation was set forth in *Romero v. Kitsap County*:

In one of his subsequent decisions, Judge Boldt stated:

> 'In order to be entitled to exercise off-reservation treaty fishing rights to nonanadromous fish and *shellfish,* any tribe party to this case shall, *prior* to any attempt to exercise such rights, present *prima facie evidence* and *arguments* supporting its claim to treaty entitlements to such nonanadromous fish and shellfish upon which the *court* may make a *preliminary determination* as to the tribe's entitlement to such *species,* pending final determination of tribal treaty-right entitlement to nonanadromous fish and shellfish. . . .'

Romero v. Kitsap County, 931 F.2d 624, 629 (9th Cir. 1991) (emphasis added).

Prior to any substantive ruling, ISCA moved in a timely fashion to intervene in these proceedings. This motion to intervene, as well as other motions of the parties, was not acted upon by the court, and the case stayed in this posture for more than a year.

Sixteen months later, in January, 1993, the Honorable Edward Rafeedie held a pretrial conference in Seattle, Washington. In the process of disposing of numerous matters, Judge Rafeedie ruled from the bench that the pending motions to intervene would be denied, including the motion of ISCA. The court held that the interests of the applicant/intervenors were adequately represented by others. The judge's personal view of intervention was articulated at the hearing:

> [I]n general that I am not in favor of a whole lot of intervention for the reason that it clutters up the case. It administratively makes it very difficult to administer, inundates the Court with papers, and my experience has been, and even in this case, that intervention really produces very little contribution.

Tr. of Ruling from Bench at 3-4, No. CV 9213, Subproceeding 89-3 (W.D. Wash. Jan. 27, 1993).

ISCA was given the right to file an *amicus curiae* position. Most importantly, the district court expressly stated that "they may have the right to seek intervention if the posture of the case changes in a *critical* way some time in the future." Tr. of Ruling from Bench at 11-12.

With this assurance from the district court, ISCA did not appeal this order denying intervention. The 26 Tideland and Upland Property Owners did, and that appeal was resolved in their favor on November 2, 1993. *United States v. Washington*, No. 93-35324 (9th Cir. Nov. 2, 1993) (Memorandum). The Ninth Circuit reversed the order of the district court and remanded the issue. The 26 Tideland and Upland Property Owners were then allowed to intervene.

In the interim, in August, 1993, the district court granted the tribes' summary judgment motion that shellfish are fish, holding that the "right of taking fish" in the Stevens Treaties, included the right to take shellfish. But even so, in November, 1993, the district court noted that in its view, the appeal of the Property Owner applicants for intervention was "*premature,*" expressly reiterating that "the denial of intervention was made without prejudice to renew. . . ."

Later in the proceedings, two ocean coastal tribes, the Quileutes and the Hohs, started signing on to tribal pleadings. Previous to this time, as the court noted, "*they were not active participants, and they sought no relief.*" *United States v. Washington*, 873 F. Supp. 1422, 1527 n. 1 (W.D. Wash. 1994) (emphasis added). App. 51.[4]

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[4] In this *amici curiae* brief, all references to "App. ——" refer to the Joint Appendix to the Petitions filed in this Court. All

In addition, the State signed a "Stipulation" with the Quinault Indian Nation on February 15, 1995. That stipulation provided that the State of Washington and the Quinault Indian Nation would *retrospectively* be "jointly bound by the Court's interpretation of the Stevens Treaties and the construction of the treaties contained in the December 20, 1994, Memorandum Opinion and Order." *United States v. Washington*, No. CV-9213, Sub-proceeding 89-3 (W.D. Wash. Feb. 15, 1995).

As a result, ISCA (Puget Sound) renewed the motion to intervene and WDCFA (coastal waters) sought leave to intervene in the same motion. Mot. for Intervention of Inner Sound Crab Association and Washington Dungeness Crab Fishermen's Association, *United States v. Washington*, No. 9213, Sub-proceeding No. CV-89-3 (W.D. Wash. Mar. 16, 1995). Importantly, as the district court noted just three months earlier, the coastal tribes were not previously "*active participants, and they sought no relief.*" *Washington*, 873 F. Supp. at 1427 (emphasis added). App. 51. Accordingly, WDCFA moved to intervene within weeks of these coastal tribes signing on to the pleadings and other stipulations noted *supra*. In the interim, the court had not entered any other substantive order.

On the basis of the written submissions, and without an additional hearing or opportunity to argue, the district court denied both motions to intervene. The district court's express statement that "they may have the right to seek intervention if the *posture of the case changes* in a critical way some time in the future," turned out to be nothing more than an empty promise. Tr. of Ruling at 11-12.

Both ISCA and WDCFA appealed the denial of their motions to intervene. A divided panel of the Ninth Cir-

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references to "*Amici* App. ——" refer to the Appendix to this *amici curiae* brief.

cuit affirmed that denial on the basis that the motions to intervene were "untimely." *Washington*, 86 F.3d at 1501. The dissent of Judge Kleinfeld put the issue in a different perspective. *Washington,* 86 F.3d at 1507 (Kleinfeld, J., dissenting). The dissent is reproduced as *Amici* App. A at 1a-6a.

Judge Kleinfeld recognized that ISCA and WDCFA were denied the opportunity to participate in a court administered regulatory system that vitally affects the interests of all members:

> The district court regulates the industry in which the proposed intervenors earn their livelihoods. They should be allowed to sit at the table where the compromises are made which will determine whether they can continue to earn an honest living in that industry.

Id. at 1509.

A timely petition for rehearing and suggestion for rehearing *en banc* was filed on the same date. *Washington,* 86 F.3d 1499 (No. 95-35446). That petition was subsequently denied in August, 1996.

In the petition, ISCA and WDCFA maintained that the majority misconstrued a confusing fact situation in reliance on the opinion of the district court. The opinion of the district court was confusing because the court addressed several pending motions for intervention in one order. Unfortunately, this confusion may have been inadvertently perpetuated by ISCA and WDCFA when they agreed to a consolidated oral argument with others in the appeal on the motions to intervene.

In any event, at approximately the same time, ISCA and WDCFA also filed a brief as *amici curiae* in the Ninth Circuit. The Ninth Circuit rejected the arguments (and all others). The district court was affirmed in every significant respect.

D. The Impact of the Decision of the Ninth Circuit Is Substantial.

The decision of the Ninth Circuit in this case effectively awards a guaranteed 50% of all harvestable shellfish species to less than 1% of the resident population of the State of Washington. In practice, at some point in time the inequity will be even more pronounced. In practice, the 50% will be closer to 60% (or even more) because of the self-regulating nature accorded these treaty rights and other uncontrollable management factors. And in practice, only a select few of the tribal members will actually share this largess.

The membership of ISCA has been devastated by the implementation of this decision. A substantial number of WDCFA members are similarly impacted already.

Francis Paul Prucha, who needs no introduction in matters pertaining to federal Indian policies, generally observed, even before the decision in this case:

> The gap is widening, I fear, between solid historical accounts and the pseudo-historical or mythical accounts adopted and proclaimed by many Indians and their white advocates.

Francis Paul Prucha, *The Challenge of Indian History,* Journal of the West, Jan. 1995, at 3.

The decision of the Ninth Circuit significantly widens this gap, albeit unintentionally. The Ninth Circuit has created a chasm that threatens to consume all of the marine creatures in Puget Sound and in the Pacific Ocean along the entire coast of Washington for 200 miles seaward. *See also* Brief of *Amici Curiae* States of Oregon, *et al., United States v. Washington,* No. 98-1026 (U.S. Mar. 1, 1999).[5]

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[5] The coastal treaty tribes are citing these erroneous decisions in pursuit of even more claims extending far into the 200-mile U.S. Economic Zone in the Pacific Ocean. 61 Fed. Reg. 279 (Jan. 4,

Strict standards of proof regarding treaty time activities have been applied (the correct ones) when tribes resist similar claims of *other* tribes. *United States v. Washington,* 764 F.2d 670, 674 (9th Cir. 1985); *United States v. Washington,* 642 F.2d 1141, 1144 (9th Cir. 1981) *cert. denied,* 454 U.S. 862 (1981). (*See also United States v. Washington,* 730 F.2d 1314, 1318 (9th Cir. 1984)). Certainly, the decision of this Court in *Washington v. Washington State Commercial Passenger Fishing Vessel Association,* 443 U.S. 658 (1989), does not support this dual standard. *Fishing Vessel* carefully sets forth the principles and guidelines that should have precluded the Ninth Circuit from accepting the extended claims of the tribes in this case.

Whether the analysis of this Court in *Fishing Vessel* is holding or dicta, in almost all other instances courts have been careful to note that they are:

> [B]ound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when [as here] dictum is of recent vintage and not enfeebled by any subsequent statement.

McCoy v. Massachusetts Institute of Technology, 950 F.2d 13, 14 (1st Cir. 1991).

In this instance, the Ninth Circuit did not adhere to this prudential rule.

1996); 61 Fed. Reg. 28786 (June 6, 1996). And the United States, by the promulgation of emergency regulations, has quickly signed on in support of the tribes' position. The United States Department of Commerce cited the district court's decision to justify "rules" allocating additional new ocean fisheries for "Washington coastal Indian tribes *without any basis in treaty time use.*" An unrelated western Makah boundary of usual and accustomed grounds and stations for salmon was simply "*extended*" south further in the ocean for "three other ocean treaty tribes." 61 Fed. Reg. 279 (Jan. 4, 1996); 61 Fed. Reg. 28786 (June 6, 1996).

Instead, the district court construed *Fishing Vessel* the other way. In more than one instance, the district court summarily and in an inappropriate manner, blurred fundamental issues. Characterizations of this litigation may be as varied as the perspectives from which it is viewed, but one thing is certain. The issues in this case are substantially more than "no brainer" legal issues, as repeatedly stated by the district court at the conclusion of the post-trial proceedings. Any judgment that reflects that point of view is flawed and clearly mistaken. *Fishing Vessel* required more, but the Ninth Circuit did nothing to correct this fundamental misconception.

Lifestyles, livelihoods and the integral nature of many communities in the State of Washington are at stake in this litigation. Nothing in *Fishing Vessel,* including the considered dicta, has been enfeebled by any subsequent statement or case. ISCA and WDCFA (and others similarly situated) should have been secure in the protection afforded by *Fishing Vessel,* where the absence of treaty time use of crab fisheries on the ocean or in deep waters would have demonstrated that such fisheries were not included in the right of "taking fish at all usual and accustomed grounds and stations." None of the equities that led to the treaty allocation of salmon exist for ocean crabbing. The Ninth Circuit opinion turns that justifiable expectation recognized in *Fishing Vessel* on its head.

The result is especially disconcerting for the members of the coastal WDCFA. *After* the August, 1993, "shellfish are fish" order, *after* the January, 1994, order regarding "certain species and *deep-water harvest,*" and right up until the December, 1994, "staked or cultivated" order, the *district court* expressly noted and confirmed that the *coastal* tribes *"were not active participants, and they sought no relief." Washington,* 873 F. Supp. at 1427, n.1 (emphasis added). App. 51.

Nevertheless, the next month after the decision (January, 1995) *coastal* tribes were permitted to sign on to tribal pleadings and enter into stipulations that purportedly establish the same "treaty rights" on the Washington coast, extending *miles* into the Pacific Ocean. Nothing in *Fishing Vessel* or in any other case justifies this kind of revisionism. Members of WDCFA are justified in their belief that they were "sandbagged." "Trial on the implementation issues took place in May, 1995. *No questions regarding crab or other deep-water species or harvests were at issue.*" Br. of Appellee-Plaintiff Tribes at 10, *United States v. Washington,* 86 F.3d 1499 (9th Cir. 1996) (No. 95-35446). Moreover, *no evidence was even offered* as to these ocean fisheries.

REASONS FOR GRANTING THE PETITION

I. THE IMPORTANT QUESTION OF WHETHER THE NINTH CIRCUIT RELIED ON THE WRONG STANDARD OF REVIEW TO DECIDE THE MEANING OF HISTORICAL INDIAN TREATIES SHOULD BE AUTHORITATIVELY RESOLVED BY THIS COURT.

The parties in this case have already directed the attention of this Court to this important question. Pet. for a Writ of Certiorari at 28-30, *State of Washington v. United States,* No. 98-1026 (U.S. December 22, 1998); Pet. for a Writ of Certiorari at 11-20, *Puget Sound Shellfish Growers v. United States,* No. 98-1028 (U.S. December 28, 1998); Pet. for a Writ of Certiorari at 24-26, *26 Tideland and Upland Private Property Owners ("UPOW") v. United States,* No. 98-1039 (U.S. Dec. 28, 1998). In addition, the cases cited in the petitions establish that the Ninth Circuit applied the wrong standard of review. The principles set forth in the cases that support this conclusion will not be repeated here.

Rather, ISCA and WDCFA put this argument first to emphasize what is clearly a *compelling* reason to grant review.

This standard of review issue has not only created conflict among the circuits, but it has also caused conflict within the circuits. *Mille Lacs Band v. State of Minnesota,* 124 F.3d 904, 917, 921 (8th Cir. 1997) *cert. granted,* 118 S. Ct. 2295 (No. 97-1337) argued Dec. 2, 1998 (wrong standard). *See also* the pathfinding *en banc* decision in *United States v. McConney,* 728 F.2d 1195 (9th Cir. 1984), that the Ninth Circuit ignored. This important question regarding the correct standard of review should be settled by this Court.

II. THE IMPORTANT QUESTION OF WHETHER TRIBES HAVE A RIGHT TO HARVEST DEEP-WATER SHELLFISH AND OTHER SPECIES, KNOWN OR NOT KNOWN AT TREATY TIME, FROM PLACES THAT WERE NOT USED BY TREATY TIME INDIANS FOR SUCH HARVESTING, SHOULD BE AUTHORITATIVELY RESOLVED BY THIS COURT.

In the process of accepting the tribes' legalistic analysis of treaty language unrelated to any historical perspective, the Ninth Circuit departed from basic tenets in this area of federal Indian law. The Cohen Handbook, ordinarily viewed as a tribal advocacy text, correctly states the controlling principle:

> The allocation of the *right* to take fish in *Fishing Vessel* was *based* on the *understanding* and *intent* of the Indians *and* the United States negotiators at the treaty negotiations. The Indians "*depended* heavily on anadromous fish as a source of food, commerce, and cultural cohesion;" [quoting *Fishing Vessel,* 443 U.S. at 686]

Felix S. Cohen, *Handbook of Federal Indian Law* (1982 ed.) ch. 8, § B3c, at 454 (emphasis added).

The decisions in the Ninth Circuit do not reflect any such understanding and intent. The "right" of taking fish cannot be mechanically expanded and applied to crab, sea urchins, sea cucumbers, or all other species *without* any regard to where tribes historically harvested such species or without any regard to whether such species were, like salmon, vital to the tribes' cultural and economic activity at treaty time.

A separate judicial proceeding was instituted here because the *nature and scope* of that right and *historic use* was *not* readily apparent and a treaty right to particular species was not clearly established in the treaty itself. *See Romero,* 931 F.2d at 624. As the Ninth Circuit explained in a different case involving the interpretation of a treaty:

> [T]he Supreme Court determined the nature of [the salmon fishing] those rights not by parsing the term "in common with," but by examining other words in the Treaty, *their historical context, the practical construction of the right, and the parties' intent.*

Cree v. Waterbury, 78 F.3d 1400, 1404 (9th Cir. 1996) (emphasis added).

In this context, a treaty right to harvest deep-water shellfish from places that were unknown or unused at treaty time is contrary to treaty language as well as the intent and understanding of the treaty negotiators.[6]

The State has set forth in its petition the major points and arguments that clearly show the errors of the Ninth

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[6] The Ninth Circuit failed to recognize that defining the scope of the treaty right is different from the issue of whether tribes may use modern improvements to harvest shellfish beds that were at one time harvested with ancient technologies. In this respect, we agree with the State that modern techniques may improve on traditional methods, but modern gear does not alter the nature of the treaty or expand it beyond treaty time fishing. The district court made no findings of fact about treaty time deep water shellfish use. *Washington,* 873 F. Supp. at 1430-31.

Circuit with specific reference to the deep water crab and other fisheries. To avoid repetition, ISCA and WDCFA adopt by reference, those arguments and points. Pet. for a Writ of Certiorari, *State of Washington v. United States,* No. 98-1026 (U.S. March 1, 1999).[7]

The State is correct in asserting that the historic harvest of crabs did not occur in the deep waters frequented by ISCA (Puget Sound) and WDCFA (coastal and Pacific Ocean). Indians never customarily harvested these shellfish, and the Ninth Circuit could not, by oversimplification, summarily conclude that areas of salmon fishing rights would, as a matter of law, include any and all shellfish harvests, including crab.

The law of the case itself requires more. Judge Boldt required the tribe to prove:

> The *species taken at treaty times, where* (usual and accustomed grounds), and by *what tribes* (who are entitled to exercise treaty entitlement) . . .

United States v. Washington, 459 F. Supp. at 1038 (W.D. Wash. 1978) (emphasis added).

The tribes could not and did not meet this fundamental burden in the district court. The record is devoid of any such evidence. The Ninth Circuit should not have ignored this fact.

The State and others have made that argument in a convincing fashion. The point that deserves additional attention here involves the coastal waters and the Pacific Ocean: the crab fishery of WDCFA. Had the district court allowed ISCA and WDCFA intervention and a "seat at the table," this issue would have received adequate

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[7] *See also* the historical arguments in Pet. for a Writ of Certiorari, *26 Tideland and Upland Private Property Owners ("UPOW") v. United States,* No. 98-1039 (U.S. Dec. 28, 1998) that support this position.

consideration. *See* Kleinfeld, J. dissent at *Amici* App. A, 1a-6a. The discussion that follows is intended to insure that this point is not neglected here.

III. THE IMPORTANT QUESTION OF WHETHER ANY USUAL AND ACCUSTOMED GROUNDS AND STATIONS BEYOND THE THREE-MILE LIMIT OF THE TERRITORIAL SEA RECOGNIZED AT TREATY TIME COULD HAVE BEEN ESTABLISHED OR RECOGNIZED BY THE UNITED STATES, SHOULD BE AUTHORITATIVELY RESOLVED BY THIS COURT.

As noted *supra,* following the district court's December, 1994, opinion, coastal tribes, including the Quileutes and the Hohs, began signing on to tribal pleadings. Previously, as the district court stated in note 1 of that opinion, *"they were not active participants, and they sought no relief." Washington,* 873 F. Supp. at 1427 n.1 (emphasis added). App. 51.

In addition, we have made reference to another coastal tribe, the Quinault Indian Nation, and to the "Stipulation" with the Quinault Indian Nation signed shortly thereafter and filed with the district court. That Stipulation provided that the State and the Quinault Indian Nation would *retrospectively* be "jointly bound by the courts' interpretation of the Stevens' Treaties and the construction of the treaties contained in the December, 1994, Memorandum Opinion and Order."

In the order regarding implementation filed in August, 1995, the district court concluded, without further explanation:

> The Tribes bound by this implementation plan are: Lummi, Nooksack, Upper Skagit, Swinomish, Tulalip, Muckleshoot, Susquamish, Puyallup, Nisqually, Squaxin Island, Skokomish, Port Gamble S'Klallam, Jamestown S'Klallam, Lower Elwha S'Klallam,

> *Makah, Hoh,* Stillaguamish, Sauk Suiattle and *Quileute.* Other Tribes may become signatories to this Plan by the agreement of all parties to the Plan or by order of the Court.

United States v. Washington, No. CV-9213, Sub-proceeding No. 89-3 (W.D. Wash. Aug. 28, 1995) (Order Re: Implementation of Shellfish Proviso).

Even this paragraph did not include the Quinault Indian Nation and yet they participated in the Ninth Circuit.

In our intervention appeal, the other tribes acknowledged that "the coastal Tribes (Quinault, Hoh and Quileute) did not seek relief in this subproceeding." Br. of Appellee-Plaintiff Tribes at 12, *United States v. Washington,* 86 F.3d 1499 (9th Cir. 1996) (No. 95-35446). This issue is further clouded by the fact that, with the exception of the Makah, coastal tribes did not have any usual and accustomed grounds and stations that extended significantly into the Pacific Ocean. At this point in time, however, the scope of their claims is wholly unrestricted. *See* discussion of Regulations *supra* at n.5. The only thing that emerges from any of this is the scope of the usual and accustomed grounds and stations established for salmon in *Washington,* 730 F.2d 1314 (Makah Pacific Ocean adjudication). Even there, the issue deserves to be revisited.

In the Ninth Circuit, ISCA and WDCFA briefly discussed the Makah tribe's previous claim to the right to take salmon 100 miles off shore in the Pacific Ocean. This isssue was raised in a separate proceeding in *Washington,* 730 F.2d 1314 (Makah). The Makah tribe cited Dr. Lane's account of 100-mile whaling trips in 1897 in support of their claim. The Ninth Circuit rejected that evidence and interpreted the treaty in reliance on what was described as more definite historic use submissions (extending 40 miles off the coast). *Id.*

Even then, the Ninth Circuit failed to address a fundamental concept: the three-mile limit of the territorial sea of the United States recognized at the time of the treaties. *See generally* Sayre A. Swarztrauber, *The Three-Mile Limit of Territorial Seas,* Annapolis, Maryland: Naval Institute Press, (1972):

> The three-mile limit under international law can be defined as the *limitation* of the seaward extension of a coastal state's [nation's] territorial jurisdiction at the outer boundary of a zone of water extending three miles from the shore of that state [nation] . . . . in an ancillary context, with *fishing, one of the most important of the reasons that states* [*nations*] *claim territorial seas. Id.* at 7-8, 43 (emphasis added).

Excerpts of this text are reproduced at *Amici* App. B, 7a-11a.

ISCA and WDCFA would respectfully submit that this important factor arguably undermines any recognition of historical usual and accustomed grounds and stations beyond the three-mile limit of the territorial seas recognized at the time of the treaties. (As such, it would appear to be a relevant matter not already brought to the attention of the Court by the parties, within the letter and spirit of S. Ct. Rule 37.1).

For this reason, we think that this fundamental concept and several factors in the Makah litigation should be briefly addressed.

(a) The State of Washington did not actively participate in this Makah controversy. The United States and the Makah tribe appeared to be the "adversaries."

(b) The brief for the United States, filed in the Ninth Circuit at the time, establishes the true nature of this adversarial procedure. Note the following "undisputed" "unchallenged" points:

> The *only* issue in dispute in this proceeding is whether the evidence presented by the Makah Tribe, *all of which was undisputed,* was sufficient to fulfill the tribe's burden of supporting its broad claim. Brief of Plaintiff-Appellee United States of America at 8, *United States v. State of Washington,* No. 83-3802 (9th Cir. Nov. 18, 1983) (second emphasis added).
>
> The purely factual findings recommended by the special master concerning activity of the Makah Indians at and prior to treaty times were *not challenged* and were adopted by the court. . . . The master's report consisted *solely* of his recommended order and he made *no comment* on why he reached any particular conclusion. . . . In summary, however, the *sole* evidence of that issue was the written report and oral testimony of Dr. Barbara Lane. *Id.* at 9 (emphasis added).
>
> [T]hat is irrelevant here because *no challenge* was, or is, made to their demeanor or credibility. *None* of their statements is *disputed* in any way. *Id.* at 12 (emphasis added).

We respectfully submit that these concessions shed light on the adversary process in *Makah.* This is the light in which the issues should be viewed in terms of the crab and other fisheries now at stake in the Pacific Ocean as a result of the decision of the Ninth Circuit below.

(c) The Brief for the United States in the Makah litigation is also significant in one other respect. The United States made no mention of the three-mile limit rule or the role played by that rule in the history and law of the United States—a role especially significant at the time these treaties were negotiated. One would think that some basic reference to this concept would be made in litigation seeking the establishment of "rights" beyond those limits. In the Makah litigation, no one mentioned the three-mile limit rule.

As *Amici* below, we brought the excerpts from the text entitled *The Three-Mile Limit of Territorial Seas* to the attention of the Ninth Circuit. It was our position that a further discussion of this issue (by the *tribe* and the *United States*) would complete the historical perspective. Of course, we really doubted that any response would be forthcoming—at least not in briefs submitted in the Ninth Circuit. No response was forthcoming. The Ninth Circuit never mentioned the issue. *See generally,* Sayre A. Swarztrauber, *The Three-Mile Limit of Territorial Seas,* Annapolis, Maryland: Naval Institute Press, (1972). *See also* excerpts of this text reproduced at *Amici* App. B at 7a-11a.

Beyond question, this rule was part of the "common notions" of United States policymakers in the 1850's. *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 151, 206 (1978). It played no role in the Ninth Circuit. Yet the nature and limits of federal power over the three-mile territorial sea should have informed the court when determining what rights were intended by the treaty. It should have confirmed that tribes were not securing rights in fisheries miles off-shore, in crab or other fisheries not previously used by the treaty time Indians.[8]

CONCLUSION

For the foregoing reasons, the Petition should be granted.

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[8] The discussion in *Fishing Vessel*, 443 U.S. at 690-691 was not directed to this issue. If the three-mile territorial sea issue is not addressed in the brief for the United States, we would respectfully submit that it would be appropriate to invite the Solicitor General to express the views of the United States on this question. At the very least, the Government's "litigating position" should be clearly stated. *South Dakota v. Bourland,* 508 U.S. 679, 697 (1993).

Respectfully submitted,

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APPENDIX A

U.S. v. Washington, 86 F.3d 1499
(9th Cir. 1996) (Kleinfeld, J., dissenting)

KLEINFELD, Circuit Judge, dissenting:

I respectfully dissent.

With respect to timeliness, two aspects of this case justify the prospective intervenors' delay. First, they do not seek to relitigate what the court decided prior to the motions to intervene. Though they do not agree with the court's decisions, their motions ask leave to intervene only with respect to the implementation plans to be prepared subsequently, and a subsequent appeal.

The majority opinion misconstrues the intervenors' position as an attempt to relitigate what has already been decided. The parties seeking intervention do not agree that sea cucumbers etc. are fish covered by the treaty, but they say expressly in their motion to intervene that they do not propose to relitigate it in the district court:

> Inner Sound . . . move[s] . . . for intervention in this action for the limited purpose of participating in the negotiation and formation of those provisions of the Court's implementation plan pursuant to the Court's memorandum opinion and order dated December 20, 1994 and any and all proceedings related to the Implementation Plan or implementation of this Court's decision of December 20, 1994. Applicants for intervention do not seek to relitigate previously decided issues, to reopen evidentiary issues, or to conduct discovery unrelated to their requested participation herein.

Harvest Divers likewise limit their motion to intervene. Their motion says they "accept the record in this proceeding as it is made to date," but they want to protect their

right to appeal the sea urchin and sea cucumber ruling now that the Washington Attorney General has withdrawn from its previous opposition to it, and want to be allowed to participate in the negotiations regarding implementation of the district court's implementation plan.

As the majority opinion concedes, the general rule disfavoring post-judgment motions to intervene does not apply if the motion seeks only to participate in the appeal. *United States ex rel. McGough v. Covington Technologies,* 967 F.2d 1392, 1395 (9th Cir. 1992); *Yniguez v. State of Arizona,* 939 F.2d 727, 734 (9th Cir. 1991). That exception applies here precisely, insofar as what they intervenors seek is the ability to participate in an appeal. It applies by analogy, insofar as the intervenors seek only to participate in the implementation negotiations following the court's decision on the substantive issue of whether the crabs, sea urchins and the sea cucumbers are fish covered by the treaty.

Second, the rule disfavoring post-judgment litigation had no application when the motions to intervene were denied, because this case had not gone to final judgment. As the majority opinion concedes, the motions to intervene were filed in March and denied in April, and the court directed that final judgment be entered in accord with its decision in August. Actually, final judgment is probably a misnomer even at that later time. There has been a final decision by the district court on an issue, but nothing to suggest that the litigation has reached an end. This litigation began in 1970. It has gone on for 2½ decades, and promises to go on indefinitely into the future, as the district court protects treaty rights to the fish in the circumstances arising from time to time. This is not like a traditional suit at equity, such as a suit for specific performance of a contract to convey real estate. In that kind

of lawsuit, the final judgment enjoins the defendant to execute a conveyance, he does, and the case is over. This case will not be over. The opinion purporting to be the decision on which final judgment was issued says that "because the Court desires to have the benefit of the parties' prior experience in *Washington I,* the Court defers the issue of injunctive relief or any plan of implementation until there has been input from the parties." *United States v. State of Washington,* 873 F.Supp. 1422, 1450 (W.D. Wash.1994). It does not purport to end the district court's control of the industry, end the process of adjudicating Indian treaty rights regarding the industry, or to be the injunction sought under Federal Rule of Civil Procedure 65(d). The district court determination that it needed "input from the parties" before issuing an injunction shows that what had been issued was not the final judgment.

In practical effect, the United States District Court regulates the Puget Sound fishery to protect treaty rights, has done so for twenty-five years, and there is no reason to doubt that it will do so for another twenty-five years. Where a district court controls an industry for decades or indefinitely, the length of the lawsuit makes it inequitable to exclude late participants in the manner which would be appropriate for a traditional suit at equity. *See Textile Workers Union v. Allendale Co.,* 226 F.2d 765, 767 (D.C.Cir.1955) ("Obviously tailored to fit ordinary civil litigation, these provisions require other than literal application in atypical cases").

In twenty-five years, the sea changes, in terms of what creatures are scarce or plentiful in Puget Sound, the technology changes, in terms of how practical it is to fish for one or another creature, and the market changes, in terms of how interested Japanese or American consumers may be in the catch. The eleven-year old child of a halibut

fisherman when this lawsuit started in 1970 may now be the thirty-six year old skipper of a crab boat, with a different kind of participation in the industry and different economic interests than his father's. Where a federal district court makes itself a permanent regulatory agency for an industry, it ill behooves the judiciary to exclude people who earn their living in the industry from being heard on how they shall be regulated, on the ground that they did not complain about other decisions at an earlier time.

As for prejudice to other parties by prolonging the litigation, there is no such thing as prolongation of something which has no end. Nor should we be concerned with preserving a delicate compromise the parties may work out, if other parties with important, unrepresented interests are excluded. A compromise between A and B in which they decide to take C's fish does not deserve protection.

As for reasons for delay, there are two reasons why this factor should not cut against the intervenors. One is that the reasons were adequate. Intervention would not have been necessary had the state won a substantive decision that the sea creatures were not covered by the treaty, and Harvest Divers would not have needed to intervene if Inner Sound had succeeded. Second, intervention in a huge suit at equity is very expensive. Someone must pay the lawyers. Parties with economic interests necessarily must weigh the huge litigation expense against the risk, and postpone bearing the expense as long as possible. We should not add to the risks and increase the penalties for late intervention, in a long-term regulatory equitable proceeding such as this one. That would cause numerous parties to intervene earlier, wasting their money and the court's time. The prospective intervenors' practical decision to let the Washington Attorney General do the work so long as she was on their side saved themselves and their adversaries money, and saved the court as well as the par-

ties a great deal of needless effort. That is praiseworthy, not punishable.

The would-be intervenors have "an interest relating to the property of the transaction which is the subject of the action" and are "so situated that the disposition of the action may as a practical matter impair or impede [their] ability to protect that interest." That is the standard for mandatory intervention under Federal Rule of Civil Procedure 24(a). The intervenors' interest is protected by the treaty, by the same words as the Indian tribes' interest. The words of the Indian treaty, which is the basis for the claims asserted in this action, protect "all citizens," not just the Indian tribes:

> The right of taking fish, at all usual and accustomed ground and stations, is further secured to said Indians, *in common with all citizens* of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horse on open and unclaimed lands: *Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens.

Art. III of the Treaty of Medicine Creek, 10 Stat. 1133 (as quoted in *Washington v. Washington State Commercial Passenger Fishing Vessel Association (Fishing Vessel)*, 443 U.S. 658, 674, 99 S.Ct. 3055, 3069, 61 L.Ed.2d 823 (1979) (emphasis added)).

The Supreme Court has already construed these words to create a treaty right to fish for non-Indian fishermen as well as Indian fishermen. "*Both sides* have a right, secured by treaty, to take a fair share of available fish." *Id.* at 684-85, 99 S.Ct. at 3074 (emphasis added). That means that the non-Indian fishermen have a "right, secured

by treaty." It may be that the State of Washington adequately represented the interests of the would-be intervenors prior to the decision on the substantive issue of whether the sea cucumbers, etc., are fish covered by the treaty. If so, then the would-be intervenors were, prior to that decision, "adequately represented by existing parties," so they were not entitled to intervention. Fed.R.Civ.P. 24(a). But once the state changed its position, then the would-be intervenors' interests were no longer "adequately represented by existing parties." That entitled them to intervene as of right.

Rule 24 is traditionally construed liberally in favor of intervention. *See, e.g., Wahington State Bldg. & Constr. Trades Council, AFL-CIO v. Spellman,* 684 F.2d 627 (9th Cir.1982). Where there is "a relationship between the legally protected interests and the claims at issue," that is generally enough for intervention. *Sierra Club v. EPA,* 995 F.2d 1478, 1484 (9th Cir.1993). The intervenors' claims in this case relate to their legally-protected interests under the treaty to share the fish in common with the Indian tribes. Reliance before the substantive decision on the state was a reasonable justification for delaying the motion to intervene until afterward, as we held in *Yniguez v. State of Arizona,* 939 F.2d 727.

The district court regulates the industry in which the proposed intervenors earn their livelihoods. They should be allowed to sit at the table where the compromises are made which will determine whether they can continue to earn an honest living in that industry.

APPENDIX B

Swarztrauber, Sayre A., *The Three-Mile Limit of Territorial Seas,* Annapolis, Maryland: Naval Institute Press, (1972):

> That the three-mile limit did emerge and exist as a rule of international law scarcely needs proving, although in the course of this book that will be accomplished for reasons of completeness.

Id. at 2.

> [T]his book gathers pertinent information and data concerning the three-mile limit from all available sources, and organizes it in historical sequence, utilizing the three-mile rule itself as the *central* theme.

Id. at 3 (emphasis added).

> The *territorial sea* is that belt of the sea adjacent to the coast of a state, beyond its land territory and its internal waters, over which the *sovereignty* of the state extends.

Id. at 3 (emphasis added).

> The three-mile limit under international law can be defined as the *limitation* of the seaward extension of a coastal state's territorial jurisdiction at the outer boundary of a zone of water extending three miles from the shore of that state. The miles are nautical miles, and they are measured from the low-water mark.

Id. at 7-8 (emphasis added).

> The three-mile limit of territorial seas, as a rule of international law, did not surface until the eighteenth century, but the concept of territorial seas had developed much earlier.

Id. at 10.

> [C]oncept that jurisdiction over the adjacent seas was a function of the effective extent of control from the land, a concept which would capture the fancy of statesmen for the next 300 years.

Id. at 20.

> Neither of these concepts dealt, except in an ancillary context, with *fishing, one of the most important of the reasons that states claim territorial seas.*

Id. at 43 (emphasis added).

> On November 8, 1793, Jefferson sent notes, almost identical in substance, to Genet and to the British minister, Mr. G. Hammond, fixing "provisionally" United States' territorial seas at three miles.

Id. at 57.

> Concerning Jefferson's mention of the three-league practice, it must be assumed that as Secretary of State he was familiar with the provisions of the 1763 Treaty of Paris between England and France, *fixing a three-league fishing zone along the North American mainland.*

Id. at 59 (emphasis added).

> The Act of 1794 . . . Seven months after the Jefferson notes were delivered to Genet and Hammond, the three-mile limit became the law of the land, enacted by the Congress of the United States:
>
> > Section 6. And be it further enacted and declared, that the *district courts* shall take cognizance of complaints, by whomsoever instituted, in cases of captures made within the waters of the United States or within a *marine league* of the coasts or shores thereof.[27]

Id. at 59-60 (emphasis added).

> *The Fishing Convention 1818* . . . With these several court cases, the three-mile limit had been ad-

> vocated by publicists, adopted as foreign policy, incorporated into domestic statutes, and upheld by the courts. All that was lacking was the recognition of the three-mile limit between governments in the form of an international treaty. *This came in 1818.*

Id. at 61.

> Convention of 1818 . . . The Americans wished to fish Canadian waters right up to the shore; the British wished to exclude them entirely. A compromise was inevitable, and again it was a *three-mile limit that became the compromise solution.* The key sentence in the Convention of 1818 reads:
>
> > And the United States hereby renounces, for ever, any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks or harbors of His Britannic Majesty's dominions in America . . . .

Id. at 63 (emphasis added) (footnote omitted).

> While the Americans would have preferred a *wider* territorial sea along their own coast, *they felt they had more to gain by exploiting the British fisheries up to within three miles, than they might lose if foreigners were to fish within three miles of the American coast.*
>
> Thus, illogically, it was a struggling, infant republic that launched the *three-mile rule,* for purposes of neutrality *and for fishing,* and for reasons quite beyond its control.

Id. at 63 (emphasis added).

> Hall's *Treatise* was first published in 1880 and has gone through eight editions. In it, he concluded that the three-mile limit is so well-fixed that it *must*

> *be assumed that a state adheres to it in the absence of an express notice to the contrary.*

Id. at 69 (emphasis added).

> At the same time, Hall seemed quite satisfied with the consistency of British adherence to the three-mile limit by pointing out a *singular departure, the Treaty of Washington of 1846, dividing the 15-mile wide Strait of Juan de Fuca equally between Britain and the United States.*

Id. at 69 (emphasis added) (footnote omitted).

> *United States.* [*S*]*he did not waiver, at least on a formal, official basis, from her 1793 position. On several occasions, in fact, she protested violations of, or departures from, the three-mile limit.*

Id. at 77 (emphasis added).

> Thus, the nineteenth century saw the three-mile rule become a fairly *well-established rule of international law.* All the great powers, and *most* of the lesser ones, had adopted the rule in some form.

Id. at 88 (emphasis added).

> California's State Constitution of 1849 had provided for ownership of the seabed out to three miles . . . .

Id. at 159 (footnote omitted).

> *Fishing.* Very early in U.S. history, the three-mile limit was considered adequate for *fishing* because of the favorable terms of the Convention of 1818 . . . . Then in 1964, she declared her exclusive rights to the living fishery resources of the continental shelf and followed this two years later with a twelve-mile fishing limit for her own coasts.

Id. at 238 (emphasis added).

> The three-mile limit failed primarily on the grounds that it did not provide coastal states a wide enough exclusive *fishing* zone.

Id. at 254 (emphasis added).

The text also quotes the views of "experts" in the area.

> It is very difficult to conceive upon what theory or by what authority any State acting alone could do any such thing, as the *existing jurisdiction rests solely upon common consent as manifested by usage.*

Id. at 127 (emphasis added) (footnotes omitted).

> In the actual conduct of affairs, it is *seldom challenged,* and *never* successfully so . . . . It has, what is still more important, sunk into, and become firmly rooted in, the consciousness of all seafaring men, who are not experts in law and whose ideas it is dangerous to unsettle.

Id. at 129 (emphasis added) (footnote omitted).

> The three-mile limit was supported by international arbitration as early as 1855. A United States-British Claims Commission was appointed under a convention of February 8, 1853, between the two countries. The Commission was to consider the case of the American fishing schooner *Washington,* which, on May 10, 1843, had been seized while fishing ten miles from the shore in the Bay of Fundy, taken to Yarmouth, Nova Scotia . . . Accordingly on January 13, 1855, he decided the case on the basis of the three-mile rule in favor of the American owners of the *Washington.*

Id. at 85 (emphasis as in original) (footnote omitted).

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No. 98-1026

In the Supreme Court of the United States

OCTOBER TERM, 1998

STATE OF WASHINGTON,

Petitioner,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE STATE OF OREGON

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INTEREST OF THE AMICUS CURIAE

Oregon writes to support the State of Washington and to urge the Court to grant the petition. At issue in this case is the interpretation of treaty language governing tribal off-reservation fishing rights virtually throughout the Pacific Northwest. The treaties at issue here, often referred to as "Stevens treaties" after Governor Isaac Stevens of the Washington Territory, contain essentially identical language concerning off-reservation fishing rights. That language provides that "[t]he right of taking fish at all usual and accustomed grounds and stations is secure . . . in common with all citizens of the Territory." FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1982), ch. 8 § B3, p. 450 n. 29; *see e.g., United States v. Oregon,* 699 F. Supp. 1456 (1988), *affirmed* 913 F.2d 576 (9th Cir. 1990), *cert. den. sub. nom Makah Indian Tribe v. United States,* 501 U.S. 1250 (1991) (applying treaties to Columbia River salmon). The State of Oregon has an immediate interest in the interpretation of this treaty clause, because allocation of fish under the so-called "Stevens treaties" governs allocations of fish between citizens of Oregon and Indian tribes.[1]

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[1] *United States v. Oregon* became the forum for allocating the harvest of fish that enter the Columbia River system, while *United States v. Washington* became the forum for allocating fishing rights within the jurisdiction of the State of Washington. *United States v. Oregon*, 913 F.2d 576, 579 (9th Cir. 1990). The parties to *United States v. Oregon* are the States of Oregon, Washington and Idaho and the four Columbia River treaty tribes (Yakama, Nez Perce, Umatilla and Warm Springs). *Id.* The Stevens treaties adjudicated there are the Treaty with the Yakamas, June 9, 1955, 12 Stat. 951; Treaty with the Nez Perce, June 11, 1855, 12 Stat.

In two important and far-reaching respects, the Ninth Circuit's interpretation of that treaty language takes a different turn from the principles for determining treaty fishing rights previously established by this Court and lower courts. These earlier cases defined the nature and scope of treaty fishing rights using evidence of historical tribal fisheries. The Ninth Circuit in the present case took a different direction. The court did not require evidence of historical tribal fisheries, finding instead a treaty entitlement to an exclusive share of species of fish never fished for at treaty times. These earlier cases also indicate that allocations between treaty and non-treaty fisheries be made taking into account equitable factors. The Ninth Circuit failed to follow this guidance. The court instead found the tribes entitled to an automatic fifty-fifty division without any consideration of the equities involved in such an allocation.

The significance of the Ninth Circuit's interpretation of the treaty language for Oregon's fishing industry is perhaps best illustrated by a tribal allocation dispute in Oregon's newly developed Pacific whiting fishery. In an effort to maintain Oregon's fishing industry in a time of declining resources, the State of Oregon (including state agencies and Oregon State University) and the private fishing industry engaged in research over the last twenty-five years aimed at development of a shore-based whiting processing industry.

957, Treaty with the Tribes of Middle Oregon, June 25, 1855, 12 Stat. 963; Treaty with the Umatilla Tribe, June 9, 1855, 12 Stat. 945.

Whiting, which masses in schools off the Pacific Coast of North America from spring to early autumn, had not previously been domestically harvested or marketed in quantity. Nor to the state's knowledge had there ever been any historic tribal whiting fishery. Pacific whiting are subject to a myxosporidean parasite, which migrates from the stomach of the fish into the flesh after death. At that point, the parasite secretes an enzyme that causes the flesh to become mushy within a matter of hours, making the fish unmarketable and practically inedible. Historically it has been impossible to bring the fish to shore without this deterioration. However, in the last few years, the research to which the State of Oregon has contributed has resulted in improved methods for handling whiting, including methods for offshore refrigeration and processing, and the uses of protease inhibitors to prevent degradation.

State-funded research has also improved and expanded the market for whiting by exploring new options for marketable forms of whiting products. Most of the Pacific whiting catch has found a new market in the processing of surimi, from which imitation crabmeat and other seafood products are made. The Oregon Economic Development Department has also underwritten and guaranteed several million dollars worth of loans made to Oregon whiting processors.

As of 1995, these state-funded efforts totalled $33 million. The private sector investment in fishing vessels, gear, processing plants, distribution and marketing represented many

more millions of dollars. By 1995, these efforts had facilitated the establishment of a shore-based whiting processing industry on the Oregon coast, with whiting comprising approximately fifty percent of all landed seafood in Oregon. Between 1994 and 1997, the industry generated an annual average of $35.6 million in personal income.

Now, because of the ruling in this case, Oregon citizens, and the industry that invested millions of dollars into the technology for processing whiting into a marketable product, have been displaced from part of the fishery. In 1996, the Makah Indian Tribe filed a "request for determination" in another subproceeding of *United States v. Washington,* No. 96-2, seeking a determination of the tribe's treaty entitlement to an exclusive allocation of Pacific whiting. The court granted summary judgment to the tribe, concluding that the district court's ruling in the case now before this Court was binding. The district court accordingly found that the Makah need make no showing that they fished for whiting at treaty times. (Order, Nov. 5, 1996.) The subproceeding is now held in abeyance because the legal issues of treaty interpretation and equitable allocation are before this Court in Washington's petition.

Also that year, the Secretary of Commerce published a rule allocating to the Makah Tribe for the first time an exclusive share of the Pacific whiting catch.[2] The Secretary did so

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[2] The Pacific Fishery Management Council prepares fishery management plans for certain fisheries within the exclusive economic zone sea-

because whiting can be taken in the Tribe's usual and accustomed fishing grounds where prior courts had found that the Makah historically fished for salmon, halibut, and certain other species. The Secretary therefore believed, "the Makahs have a treaty right to harvest one-half of the harvestable surplus of the Pacific whiting stocks found in their [usual and accustomed] area." 61 Fed. Reg. 10303 (proposed rule). In reaching that conclusion, the Secretary specifically cited the district court's opinion in this case.[3] Since the original rule, the Secretary has continued to base whiting allocations for the Makah on the same reasoning. 62 Fed. Reg. 700, 718 (Jan. 6, 1997)[4]; 63 Fed. Reg. 419, 442 (Jan. 6, 1998).[5] The current

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ward of the States of Washington, Oregon and California. The Secretary has authority to approve such plans, considering "Indian treaty fishing rights, if any." 16 U.S.C. § 1853(a)(2); 16 U.S.C. § 1854.

[3] "In the shellfish subproceeding (89-3) in *United States v. Washington,* the court found that the right to take fish that was reserved in the treaties must be read to apply to all fish, without any species limitation." 61 Fed. Reg. 10303; *see also* 61 Fed. Reg. 28786, 28788 (final rule).

[4] "The [Pacific Fishery Management] Council's recommendation of no allocation is not acceptable because federal district court Judge Rafeedie held that tribes have a right to all fish in their usual and accustomed fishing areas, with no species limitation."

[5] The Secretary's whiting allocation rule gave rise to litigation filed in the United States District Court for the District of Oregon, which was transferred to the Western District of Washington, and is now on appeal to the Ninth Circuit. *Midwater Trawlers Cooperative et al. v. United States Department of Commerce et al.,* Civ. No. 96-6170-TC, C96-1808R, Ninth Cir. No. 97-36008, submitted Sept. 17, 1998. The district court dismissed the case for procedural reasons and did not reach the merits of the legal propriety of the Secretary's determination of the Makah's treaty right. The issue could arise again if there is a remand.

allocation to the Makah is 25,000 metric tons (55 million pounds) of whiting. The outcome of this case, therefore, has a critical impact on future whiting allocations.

Oregon's interest in this case extends beyond its interest in the whiting fishery, because the court's interpretation of the treaty creates uncertainty as to proper allocation of any number of species that were not fished for in at usual and accustomed grounds and stations at treaty times. For instance, the Columbia River contains species that were not fished for at treaty times, and which could form the basis for disputes in the context of *United States v. Oregon.* As another example, in the usual and accustomed fishing grounds previously adjudicated for salmon off the coast of Oregon and Washington are found over 80 species of fish, located down to depths of 1,000 fathoms. The Oregon coast fishing communities of Astoria and Newport depend on shrimp, crab and groundfish off the coast of Washington, where are located species of shellfish never fished for at treaty times. Also, in these waters are species of groundfish besides whiting, such as the thornyhead rockfish, that were not fished for at treaty times. Under the court's analysis in this case, once the usual and accustomed fishing grounds for anadromous fish have been determined, treaty tribes may be entitled to an exclusive share of any and all other species that may be found there.

Finally, this case may have ramifications broader than the interpretation of the fishing clauses of the Stevens treaties. Even where tribal fishing or hunting rights arise from differ-

ent treaty language, this case provides a precedent for ignoring the role of historic Indian practices in determining treaty rights, as well as a precedent for ignoring the role of equity in determining allocation.

REASONS FOR GRANTING THE WRIT

This Court has previously recognized the importance of the treaty rights at issue here, as is evidenced by the fact that on seven prior occasions it has granted certiorari to interpret the treaty language. *See Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 657, 679 (1979) ("*Fishing Vessel*")(detailing six prior occasions). Review is necessary once again, this time to clarify an issue of increasing practical significance: whether the treaties were intended to grant the tribes an automatic share of fisheries unfished for or even unknown when the treaties were executed.

This ruling affects many others beyond the Washington commercial fishers, shellfish growers and property owners whose rights are directly adjudicated here. As the preceding discussion shows, this case has had a significant and immediate effect on Oregon's Pacific whiting industry and those who have invested in its development. Yet the whiting situation presents a mere illustration of the potentially far broader impact of the ruling. As natural resources face more threats and pressures, governments and private interests are likely to seek to invest in new processes and markets for previously undeveloped fish resources. Under the ruling in this case, these

resources will be subject to an automatic exclusive tribal share, regardless of the tribes' historical dependence on the resource and regardless of the contribution of others to the availability of the resource.

I. The Court should grant the writ to clarify whether there is a treaty right to species not fished for at treaty times.

A review of the history of the *United States v. Washington* litigation demonstrates how the courts have interpreted the treaty term "the right of taking fish at all usual and accustomed grounds and stations" in light of the tribes' actual historical practices. In 1974, Judge Boldt issued his comprehensive opinion, adjudicating the treaty rights of fourteen tribes to anadromous fish (salmon and steelhead) under the Stevens treaties. *United States v. Washington*, 384 F. Supp. 312 (W.D. Wa. 1974)(*"Boldt I"*). This decision was ultimately reviewed by this Court in the "*Fishing Vessel*" case. At issue in this Court was whether the tribes had negotiated to reserve an opportunity to try to catch fish, or whether they had negotiated to reserve an absolute right to "take" a share of the available fish.

As is shown below, this Court's analysis, as well as that of the district court, determined the treaty right by considering evidence of what the Indians actually did, including which Indians fished for which species of fish, and where. Yet in resolving the question presented for shellfish species, the Ninth Circuit took a different approach, finding such historical evidence unnecessary.

First, in his almost 100-page-long opinion in *Boldt I*, Judge Boldt thoroughly considered the history of the Stevens treaty negotiations and concurrent tribal practices. Judge Boldt began by noting the parties "exhaustive research in anthropology, biology, fishery management and other fields of expertise." 384 F. Supp. at 328. With respect to each tribe, the court made findings regarding the treaty time fishing areas and fishing techniques as to anadromous fish. *Id.* at 359–82; *see, e.g.*, 363–65 (findings regarding Makah Tribe).

The court paid careful attention to the pretreaty dependence of these tribes on salmon and other anadromous fish. *Id.* at 350. The court found that the taking of salmon and steelhead from the tribes' usual and accustomed places constituted "both the means of economic livelihood and the foundation of native culture." *Id.* at 407. These fish, stressed the court, were "vital to the Indian diet, played an important role in their religious life, and constituted a major element of their trade and economy." *Id.* at 350. The court described the "first-salmon ceremony," a religious rite engaged in to ensure continued return of salmon. *Id.* at 351.

The Indians' historical dependence on anadromous fish played an important role in the treaty negotiations. A primary concern of the Indians "whose way of life was so heavily dependent upon harvesting anadromous fish" was that they have freedom to gather food, particularly salmon, at their usual and accustomed fishing places. *Id.* at 355. The record showed that the treaty Indians insisted upon retaining the

exercise of their right to fish as necessary to their survival. *Id.* at 334. Further, the record of treaty negotiations revealed no discussions indicating the Indians were told that their "existing fishing activities" would be restricted or impaired by the treaty. *Id.* at 357.

After detailing these extensive findings, the court concluded that the tribes had bargained for a right to "share equally" in the harvestable fish at their usual and accustomed fishing grounds and stations. *Id.* at 343. The court made factual findings to determine the location of the various "usual and accustomed" grounds. In order to make these findings, the court reviewed the history of each tribe's fishing practices at treaty time. That history included species fished for, the locations, and the tribes that engaged in the activity.

When the Supreme Court reviewed *Boldt I,* it focused as well on the tribes' historical practices, both in determining the understanding of the tribes in the treaty negotiations and in setting a framework for determining the scope of the rights. In affirming the district court's conclusion that the treaty was intended to secure the tribes a right to "share equally" in the harvestable fish at their usual and accustomed fishing grounds and stations, this Court construed the treaty in light of what the tribes' treaty time anadromous fishing activities had meant to them historically.

Quoting *Boldt I,* the Court emphasized the dependence of the various tribes on anadromous fish for food and commercial purposes. *Fishing Vessel*, 443 U.S. at 664–65. In

that context, the Court reviewed the history of treaty negotiations, repeatedly referencing the tribes' insistence on continuing to support themselves by fishing in the same manner as they had historically. The Court cited contemporaneous evidence that the treaty negotiators recognized the importance of the fisheries to the Indians, and quoted a statement of Governor Stevens that: "It never could have been the intention of Congress that Indians should be excluded from their ancient fisheries . . ." *Id.* at 666 n. 9. In addition, the Court noted the district court's findings regarding the Yakama Tribe's understanding that they would be able to continue fishing for the same species of fish:

> At the treaty council the United States negotiators promised, and the Indians understood, that the Yakimas would forever be able to continue the same off-reservation food gathering and fishing practices as to time, place, method, species and extent as they had or were exercising.

Id. at 667, quoting *Boldt I*, 384 F. Supp. at 381. The Court referenced similar findings with respect to the Makah. *Id.* at 668. The Court also quoted Judge Boldt's finding that there was no record indicating that the Indians were told that their "existing fishing activities" would be impaired by the treaty. *Id.* n. 12, *quoting Boldt I,* 384 F. Supp. at 357.

The tasks that remained for Judge Boldt following the *Fishing Vessel* decision were defined in part by the need for the tribes to establish what their treaty time fishing activities had been. In *Boldt I*, the court had addressed only salmon and other anadromous fish. Thus, among other issues to be deter-

mined after this Court's review of *Boldt I* in *"Fishing Vessel"* was the treaty right to other, nonanadromous, fish species. The district court had maintained continuing jurisdiction to resolve this issue and other treaty fishing issues, including the location of other usual and accustomed fishing grounds, and had set a process for "requests for determination" of such matters. 384 F. Supp. at 419. After this Court's *Fishing Vessel* decision, Judge Boldt further specified the process for determining treaty rights to these other species of fish. *United States v. Washington*, 459 F. Supp. 1020 (W.D. Wa. 1978) ("*Boldt II*"). The court focused on which tribes fished for which species of nonanadromous fish and where:

> In order to be entitled to exercise off-reservation treaty fishing rights to nonanadromous fish and shellfish, any tribe party to this case shall, prior to any attempt to exercise such rights, present prima facie evidence and arguments supporting its claim to treaty entitlements to such nonanadromous fish and shellfish upon which the court may make a preliminary determination as to the tribe's entitlement to such species, pending final determination of tribal treaty-right entitlement to nonanadromous fish and shellfish.

Boldt II, 459 F. Supp. at 1037 ("Paragraph G"). Among the matters as to which the court was to maintain continuing jurisdiction were "[t]he species taken at treaty times, where (usual and accustomed grounds), and by what tribes (who are entitled to exercise treaty entitlement)." *Id.* at 1038. That the court set out this process implies that it had concluded that, for each tribe to establish its treaty fishing right to species

other than salmon, the tribe had to do more than simply rely on the "usual and accustomed" fishing grounds adjudicated for salmon. The only point of the process Judge Boldt described would be to establish "usual and accustomed" grounds that were different for nonanadromous fish.

The conclusion that the tribe could not simply rely on "usual and accustomed" fishing grounds adjudicated for salmon in establishing treaty rights to nonanadromous fish is consistent with the treaty language. That language itself references the tribe's historical practices at "usual and accustomed" places. And consistent with this Court's emphasis on the tribes' "ancient fisheries" and "existing fishing practices," the purpose of defining usual and accustomed grounds is to pinpoint the location of a treaty time activity, the activity for which the treaty reserves a right. It would not be enough simply to show that some tribe fished at a particular place; rather each tribe must show what that tribe fished for and where.

In the instant case, the Ninth Circuit failed to follow the direction indicated in *Fishing Vessel* and the *Boldt* decisions. Rather than basing the location of "usual and accustomed" fishing grounds for shellfish on treaty time fishing activities, the court instead presumed that all fishing activities were defined by the previously adjudicated usual and accustomed fishing grounds for other species. The Court should grant certiorari to clarify the role of historical treaty fishing practices in the determination of treaty fishing rights.

II. The Court should grant the writ to clarify the role of equitable factors in treaty fishing allocations.

The Ninth Circuit departed from this Court's guidance in a second way. Once this Court determined that the tribes were entitled to a "share" of the fish, the court did not simply apportion the fish on a fifty-fifty basis. The Court agreed with the *Boldt I* decision that "in common with" meant a maximum figure of fifty percent, depending the tribes' historical and current circumstances. The Court emphasized the district court's finding that at treaty time the tribes had depended heavily on these kinds of fish as a source of food, commerce and cultural cohesion. 443 U.S. at 686. Only based on that finding had the court determined that the tribes' present-day needs should be met. *Id.* Indeed, fifty percent was a maximum figure: "Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but no more than, is necessary to provide the Indians with a livelihood . . ." *Id.* Thus, this Court stressed that it was not guaranteeing the tribes a specified percentage of the fish. *Id.* at 686 n. 27.

Yet—other than considering whether an allocation might be needed by the tribes to maintain a "moderate living standard" as discussed in *Fishing Vessel*—the Ninth Circuit failed to consider treaty time practices and other equitable factors in determining the tribes' "fair share." Contrary to the guidance of *Fishing Vessel,* the Ninth Circuit made an automatic fifty-fifty allocation between tribal and non-tribal fisheries. As

noted above, this mechanical approach has been adopted with respect to the Pacific whiting fishery, without consideration of the extent of treaty time dependence on the whiting resource or the contribution of non-Indians to developing the ability to harvest the resource in the first place. The Court should grant review to consider the role of such equitable factors in treaty fishing allocations.

CONCLUSION

For the foregoing reasons, this Court should grant the writ.

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Nos. 98-1026, 98-1028, 98-1039 and 98-1052

In the Supreme Court of the United States

OCTOBER TERM, 1998

STATE OF WASHINGTON, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

PUGET SOUND SHELLFISH GROWERS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

26 TIDELAND AND UPLAND PRIVATE PROPERTY OWNERS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

LARRY B. AND SHIRLEE ALEXANDER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the "right of taking fish at all usual and accustomed grounds and stations * * * in common with all citizens," reserved by respondent Indian Tribes in the Stevens Treaties, entitles the Tribes to take an equitable measure of the harvestable shellfish of every species found within their customary fishing areas, except as limited by the shellfish proviso.

2. Whether the treaty "right of taking fish at all usual and accustomed grounds and stations * * * in common with all citizens" entitles the Tribes to harvest shellfish on private lands and to gain access to private uplands for the purpose of exercising shellfishing rights in the absence of access by other means.

3. Whether the court of appeals correctly applied the "moderate living" doctrine of *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

4. Whether the court of appeals correctly interpreted the shellfish proviso, which excludes the Tribes from taking shellfish from "beds staked or cultivated by citizens."

5. Whether the court of appeals correctly refused to apply the doctrine of laches to bar this suit.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-49) is reported at 157 F.3d 630. The opinions of the district court are reported at 873 F. Supp. 1422 (Pet. App. 51-93), 898

F. Supp. 1453 (Pet. App. 95-134), and 909 F. Supp. 787 (Pet. App. 135-148). Additional opinions of the district court (Pet. App. 153-162) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1998. The petitions for rehearing were denied on September 25, 1998. Pet. App. 8-9. The petitions for a writ of certiorari in Nos. 98-1026 and 98-1039 were filed on December 22, 1998, and the petitions in Nos. 98-1028 and 98-1052 were filed on December 28, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1854 and 1855, respondent Indian Tribes of what is now western Washington State entered into the Stevens Treaties,[1] under which they relinquished their right to most of their territory in exchange for periodic monetary payments, small parcels of land set aside for their exclusive use, and certain other guarantees, including the preservation of their aboriginal fishing rights throughout their ceded lands in Puget Sound. In essentially identical language, each of the Treaties provided:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians,

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[1] The treaties are known as the "Stevens Treaties" because Isaac Stevens, the Governor and Superintendent of Indian Affairs for the Washington Territory, was directly involved in their negotiation. See *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 666 (1979). Each of the Tribes in this litigation (see Pet. App. 9 n.1) is the successor-in-interest to one or more of those treaties, which include the Treaty of Medicine Creek, Dec. 26, 1854, 10 Stat. 1132; the Treaty of Point Elliott, January 22, 1855, 12 Stat. 927; the Treaty of Point No Point, January 26, 1855, 12 Stat. 933; the Treaty with the Makah, January 31, 1855, 12 Stat. 939; and the Treaty of Olympia, July 1, 1855, 12 Stat. 971. See Pet. App. 169-209.

> in common with all citizens of the Territory, * * *: Provided, however, That they shall not take shell fish from any beds staked or cultivated by citizens[.]

Pet. App. 12; see, *e.g.*, *id.* at 170.

Both the United States and the Tribes viewed protection of the Tribes' fishing rights on the ceded lands as an essential ingredient of the Treaties. See Pet. App. 10-11; *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 665-668 (1979) (*Fishing Vessel*). From time immemorial, the Tribes have used and relied on fish, including shellfish, for commercial, subsistence, and ceremonial purposes. See *ibid.*; see also *United States* v. *Winans*, 198 U.S. 371, 381 (1905) (fishing was "not much less necessary to the existence of the Indians than the atmosphere they breathed"). At the time of the Treaties, the Indians took an enormous variety of fish, including over 100 species of shellfish. Shellfish were particularly important to the Tribes because of their dependability and accessibility, especially when other sources of food became temporarily scarce. S.E.R. 1033-1034. The Tribes traded shellfish with other Indians and with non-Indians, supplying most of the non-Indian settlers' fish, including clams and oysters. *Fishing Vessel*, 443 U.S. at 666 nn. 7 and 8; E.R. 54-55.

By treaty time, a shellfish cultivation industry had begun to develop in the Washington Territory. The United States treaty negotiators were familiar with the practices of that industry, modeled after the older, larger, and more developed industry on the East Coast.[2] Pet. App. 11. The industry was based primarily on the planting or transplanting of shellfish, primarily oysters, in artificial beds.

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[2] In the mid-nineteenth century, shellfishing was a major industry that employed a large number of people. It was regularly covered by the popular press, and its practices were generally known to the public. S.E.R. 116.

Shellfish farmers also commonly stored market-sized shellfish in beds that did not naturally contain the kind of shellfish being stored, and they identified the boundaries of those man-made storage areas by marking them with stakes extending above the surface of the water. *Ibid.* The popular literature, professional treatises, government studies, and state shellfish laws of the time all confirm a basic fact of the mid-19th century shellfish industry: natural oyster beds, then considered "the common property of the people," *id.* at 61, were not staked or cultivated, *id.* at 61-66.

Fish, including shellfish, were exceptionally abundant and were considered inexhaustible at treaty time. Pet. App. 11. The United States negotiators thus believed that preserving the Tribes' off-reservation fishing rights would not interfere with the rights of citizens. The negotiators, aware of the thriving shellfish industry on the East Coast, assumed that development on Puget Sound also would not interfere with the Tribes' exercise of their treaty fishing rights. *Ibid.* The treaty negotiators, in keeping with their pledge to preserve for the Indians their ancient fisheries, wrote those assurances into the fishing rights provision of the Stevens Treaties. See *id.* at 27.

2. For years following the Treaties, the Indians continued to harvest a majority of the shellfish resource. During that period, the Washington territorial government continued to observe the public's general right of taking shellfish from natural beds and to recognize private ownership rights only in the products of artificial shellfish beds. After its admission to the Union in 1889, however, Washington took two courses of action that, in combination, increasingly excluded the Indians from the shellfish resource. First, the State gradually began selling off its tidelands, including some of the most productive for shellfish production, to private owners. The "vast majority" of those tidelands are now privately owned. Pet. App. 12. Second,

around the turn of the century, Washington modified state law to give private property owners exclusive rights to shellfish found on natural beds. *Ibid.* Thus, even though the Tribes dominated natural shellfisheries for decades following the Treaties, non-Indians gradually came to monopolize them as increasing numbers of those shellfisheries fell into private hands.

In addition, the shellfish resources of Puget Sound and their availability for human consumption have diminished as a result of tideland development and pollution. Native shellfish have declined dramatically and have been largely replaced by foreign species introduced into the area after the Treaties. Pet. App. 12.[3] This litigation, initiated by the Tribes and the United States, is the consequence of the increasing competition for, and depletion of, the shellfish resource. When this suit was filed, the Tribes' harvest of shellfish had diminished to a tiny percentage of the non-Indian harvest.

3. In 1970, the United States, on its own behalf and as trustee for several of the Tribes, sued the State of Washington in federal district court, seeking declaratory and injunctive relief under the fishing rights provision of the Stevens Treaties. Following extensive pretrial proceedings and a lengthy trial, the district court established the locations of the Tribes' "usual and accustomed" fishing grounds and ruled that the Tribes' treaty rights entitled them to take

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[3] For example, native littleneck clams have been replaced substantially by an introduced species, manila clams, which constituted more than 80% of the total clam harvest in Puget Sound during the years 1988-1990. Pet. App. 12. In addition, the intertidal populations of geoduck clams and crabs, once abundant enough for commercial fisheries, have continued to decline. S.E.R. 996, 1009. Today, most of those species, along with octopus, sea urchins and sea cucumbers, are found in deep waters. See Wash. Pet. 4-5; S.E.R. 970.

up to 50% of the harvestable fish from those grounds.[4] *United States* v. *Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) (*Washington I*), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976). The district court's ruling met substantial resistance from the State and spawned numerous other lawsuits that ultimately reached this Court, where the district court's interpretation of the Treaties was affirmed. See *Fishing Vessel*, *supra*.

4. In 1989, sixteen Indian Tribes, later joined by other Tribes and the United States, followed a procedure established in *Washington I* and sought a declaration of the nature and scope of their off-reservation shellfishing rights under the Treaties and injunctive relief to enforce those rights. Pet. App. 14. Several other groups subsequently intervened in the action: the Puget Sound Shellfish Growers; the Alexander group and Adkins group of private tideland owners; and a group of private property owners affiliated with the United Property Owners of Washington (UPOW).

After extensive pretrial proceedings, followed by a trial lasting three weeks, the district court issued its decision. Pet. App. 51-93. Finding that "shellfish" are "fish" within the meaning of the Stevens Treaties, the district court concluded that the prior decisions of this Court and the lower federal courts over the past 90 years interpreting the Tribes' treaty fishing rights apply fully to shellfish. Accordingly, the district court ruled that the Treaties entitle the Tribes to take an equitable portion of the harvestable shellfish of every species found within the usual and accustomed fishing

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[4] In its original fishing rights decision, the district court endeavored to resolve almost every issue of fact and law concerning the Tribes' "right of taking fish" at their "usual and accustomed" fishing areas under the Treaties. See 384 F. Supp. at 328-331. Thus, the trial and decision included evidence of tribal fishing for many types of fish, including shellfish, although the relief requested and granted was limited to anadromous fish. See *id.* at 312-423.

areas identified in *Washington I*, except as expressly limited by the shellfish proviso. *Id.* at 51-59.

Turning next to the proviso, the district court "interpret[ed] the terms 'staked' and 'cultivated' as the terms were defined and used in the shellfishing industry at and before treaty time." Pet. App. 77. After a thorough review of the historical evidence relating to that issue, the district court determined that the treaty negotiators viewed "natural" beds and "staked or cultivated" beds as mutually exclusive categories, and it concluded that the proviso was intended to exclude the Tribes from artificial, but not natural, shellfish beds. *Id.* at 59-79.

The district court then directed the parties to design a joint implementation plan for the Tribes' shellfish rights under the Treaties. After the parties failed to reach consensus on a plan, the court held a second trial. The district court issued an implementation decision and an implementation plan that, among other things, imposed specific restrictions on the Tribes' ability to harvest shellfish on private properties and set forth dispute resolution procedures using a special master. Pet. App. 95-134.

5. The State, together with the intervening commercial shellfish growers and private property owners, appealed. The United States and the Tribes cross-appealed from several rulings made by the district court in its implementation decision.

The court of appeals first affirmed the district court's basic interpretation of the Treaties. It concluded that the right of taking shellfish is coextensive with the right of taking other kinds of fish, and that, under the line of authority culminating in this Court's decision in *Fishing Vessel*, the Tribes may take an equitable portion of shellfish of every species found anywhere within their customary fishing areas, except as limited by the shellfish proviso. See Pet. App. 17-25. The court of appeals then affirmed the

district court's interpretation of that proviso, holding, among other things, that petitioners' contrary interpretation violates "black-letter canons" of treaty construction and "is totally inconsistent with the United States' avowed intention to preserve for the Indians their ancient fisheries." Pet. App. 27-28 (internal quotation marks omitted). Although the court reviewed for clear error the district court's findings on certain predicate facts (such as the practices of the mid-19th century shellfish industry and the familiarity of the treaty negotiators with those practices), it "review[ed] de novo whether the district court reached the proper conclusion as to the meaning of the [proviso] given those findings," *id.* at 16, and then independently determined that the district court's interpretation was in fact "correct," *id.* at 26.

The court of appeals reversed portions of the district court's implementation decision, which the United States and the Tribes had challenged in their cross-appeals. The court held, among other things, that the district court had abused its discretion by applying notions of equity to redefine the treaty term "cultivated" so as to limit the Tribes' rights to shellfish from the commercial shellfish Growers' properties. That interpretation, the court reasoned, would result in abrogation of the Tribes' treaty right. Pet. App. 29-32. Rejecting other arguments of the United States and the Tribes, however, the court concluded that "only those Growers' beds that exist solely by virtue of the natural propagation of the species are subject to a full fifty-percent harvest allocation." *Id.* at 34. Thus, where the Growers had enhanced shellfish production on natural beds, the Tribes are entitled to a share only of "the pre-enhanced sustainable shellfish production from those beds." *Id.* at 34-35 & n.12. That allocation analysis, however, does not apply to the

Growers' artificial beds, which the shellfish proviso wholly excludes from the Tribes' treaty rights. *Id.* at 35.[5]

ARGUMENT

Two points of agreement among the parties are essential to a proper understanding of this case. First, the district court found that shellfish are "fish" within the meaning of the Stevens Treaties (see Pet. App. 52, 56-57), and petitioners have acquiesced in that ruling. Second, petitioners present no claim that the Tribes wish to exercise fishing rights in geographical areas where they had historically engaged in no fishing at all. The boundaries of the Tribes' "usual and accustomed" fishing grounds were set in *Washington I*, and all shellfish beds at issue are located within those boundaries. See Pet. App. 19-20, 57-58. The question here is whether the Tribes may take certain *kinds* of fish—shellfish—in those same geographic areas, along with the other kinds of fish that they are unquestionably entitled to take there. See *id.* at 19; *id.* at 57-58; see also Alexander Pet. 18.

As discussed more fully below, the parties' agreement on those two matters is largely dispositive of this case. Because shellfish are "fish," these petitions present few issues that are not squarely resolved, in the Tribes' favor, by this Court's existing decisions construing and enforcing the Stevens Treaties. Petitioners' basic position is that the Tribes' "right of taking fish" under the Treaties must yield in critical respects to the sale of the "vast majority" (Pet. App. 12) of tidelands in Washington State to private owners. In

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[5] Judge Beezer concurred separately to express, among other things, his concerns over the private shellfish Growers' property rights, the law of the case on the meaning of the fishing rights provision of the Stevens Treaties, and the appointment of a special master to resolve disputes under the implementation plan adopted by the lower courts. See Pet. App. 42-49.

Fishing Vessel, however, this Court held (or, more precisely, reaffirmed) that "[t]he contingency of the future ownership of the lands * * * was foreseen and provided for" (443 U.S. at 680 (quoting *United States* v. *Winans*, 198 U.S. 371, 381 (1905)) when the Treaties were signed; that the Treaties provided for that contingency in part by entitling the Tribes to "cross[]" and "occupy" private property when exercising their "right of taking fish" (*id.* at 680-681 (quoting *Winans*, 198 U.S. at 381)); that neither side to this dispute "may rely on the State's regulatory powers or on property law concepts to defeat" rights under the Treaties (*id.* at 682); and that the "equitable measure" of fish the Tribes are entitled to take under the Treaties "should initially divide the harvestable portion * * * into approximately equal treaty and nontreaty shares," subject to reduction upon a fact-specific showing that "tribal needs may be satisfied by a lesser amount" (*id.* at 685). Those holdings decide virtually every dispute in this case, except for the meaning of the shellfish proviso. And, as discussed below, the court of appeals' interpretation of that proviso is correct, and its precedential significance is confined to this case alone. Further review is therefore not warranted.

1. a. Petitioners contend (State Pet. 12-18; Growers Pet. 26-28) that the Tribes' right to take shellfish should be confined to the species that they took at the time of the Treaties and further confined to the exact places where those species were then found. Again, this is not a dispute about the geographical reach of the Tribes' "usual and accustomed grounds" for fishing in general, which have long been held to include all areas at issue, including "deep water" areas. See Pet. App. 159; see also *id.* at 19-20. Instead, petitioners contend that the Treaties give the Tribes access to those areas for purposes of taking many kinds of fish (such as salmon and herring) but not others (in particular, not certain species of shellfish).

As an initial matter, the factual premise of that claim—that the Tribes traditionally took few shellfish and never in deep water (see Wash. Pet. 21)—is very much disputed, although petitioners do not make that clear. At treaty time, the Tribes had long taken many species of shellfish, both for their own consumption and for commercial purposes. See, *e.g.*, Pet. App. 10. Moreover, the Tribes introduced substantial evidence at trial that their shellfishing activities extended to deep water areas, despite the assumption to the contrary in the State's petition. See Tribes C.A. Br. 88-92. Finally, although the State repeatedly uses the term "deep water shellfish" (see, *e.g.*, Pet. 21) as though it identified particular species (which, the State erroneously suggests, the Tribes could never have taken), many species of shellfish can and often do exist naturally in both intertidal and deep waters. See note 3, *supra*.

Even apart from those threshold factual problems, however, petitioners' species-based construction of the Stevens Treaties is without merit. The Treaties reserve the Tribes' preexisting and plenary "right of taking fish," subject only to the proviso against taking shellfish from beds "staked or cultivated" by non-Indians. Had the treaty negotiators intended to limit that general right to the species and harvest methods used at treaty time, despite inevitable changes in fish populations, they would have made that clear, and they would not have chosen the word "fish," which has "perhaps the widest sweep of any word the drafters could have chosen," Pet. App. 18, and which "fairly encompasses every form of aquatic animal life," *id.* at 57. Even if the treaty language were in any respect ambiguous, which it is not, it is hornbook law that ambiguities in Indian treaties "are to be resolved in favor of" the Indian signatories, *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973), a principle that this Court has repeatedly applied in

cases involving interpretation of the Stevens Treaties. See, *e.g.*, *Fishing Vessel*, 443 U.S. at 679.

Nor can support for petitioners' approach be derived from the judicial decisions upon which they rely. Petitioners focus on this Court's observation in *Fishing Vessel* that "securing" fishing rights is "synonymous with 'reserving' rights previously exercised." 443 U.S. at 678. But, as the Court added in the next sentence, the "right previously exercised," on which this Court placed a "broad gloss" (*id.* at 679), is defined as the general right of tribal members "to meet their subsistence and commercial needs by taking fish from treaty area waters" (*ibid.*). That is precisely the right that the Tribes seek to exercise here, and nothing in *Fishing Vessel* suggests that the right should be subdivided and limited on the basis of species. See also *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392, 398 (1968).[6] Similarly, petitioners' position draws no support from *Seufert Brothers Co.* v.

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[6] The State also notes that, as quoted in the background section of *Fishing Vessel* (see 443 U.S. at 667), the district court had observed in *Washington I* that, under their Treaty, "the Yakimas would forever be able to continue the same off-reservation food gathering and fishing practices as to time, place, method, species and extent as they had or were exercising." 384 F. Supp. at 381. But nothing in *Washington I*, much less *Fishing Vessel*, supports the notion that Indian fishing rights could be subject to *limitations* based on species. To the contrary, in a passage of *Washington I* that petitioners fail to cite, the district court held that the Tribes' treaty right "is not limited as to species of fish, the origin of fish, the purpose or use or the time or manner of taking," and that the treaties "do not prohibit or limit any specific manner, method, or purpose of taking fish." 384 F. Supp. at 401, 402. That determination was based on the district court's finding that, historically, "Indian fishing was not limited to any species. They took whatever species were available at the particular season and location." *Id.* at 350- 352. The district court's legal conclusions in *Washington I* were affirmed in all respects in *United States* v. *Washington*, 520 F.2d 676, 693 (9th Cir. 1975), and were left undisturbed in *Fishing Vessel*.

United States, 249 U.S. 194 (1919). Cf. Wash. Pet. 18; Growers Pet. 26-28. The issue in that case was not the content of the Tribes' "right of taking fish," but the boundaries of the Tribes' "usual and accustomed" grounds for exercising that right. The two issues are distinct, and, as noted, the latter is not presented here.[7]

Finally, the State contends (Pet. 19-21) that the courts below improperly applied the apportionment or "moderate living" standard set forth in *Fishing Vessel*, and that allocation of shellfish resources must depend on the "historic

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[7] The State contends (Pet. 16-17) that the decision below conflicts with decisions holding that certain other Indian treaties pose no obstacle to prosecution of individual Indians who violate a federal criminal prohibition on the commercial sale of eagle feathers. See *United States* v. *Dion*, 752 F.2d 1261 (8th Cir. 1985) (en banc), on remand to 762 F.2d 674 (8th Cir. 1985), rev'd in part, 476 U.S. 734 (1986); *United States* v. *Top Sky*, 547 F.2d 486 (9th Cir. 1976). There is no such conflict. In those cases, the courts concluded that the Indians neither understood nor intended that their treaty right would encompass a right to sell eagles commercially, and that they in fact "deplored" the practice. *Top Sky*, 547 F.2d at 487-488; *Dion*, 752 F.2d at 1264. Here, by contrast, the historical evidence establishes that the Tribes took virtually all species of fish, including shellfish, available to them for commercial, subsistence, and other purposes, and that the Indians understood the Stevens Treaties to reserve their right to take all kinds of fish, including shellfish, at their usual and accustomed fishing areas. See, *e.g.*, *Fishing Vessel*, 443 U.S. at 665-668. Finally, the district court decisions upon which the State relies (Pet. 15) actually support the legal conclusion that the Tribes' fishing right is not limited by species or harvest methods. See *United States* v. *Michigan*, 471 F. Supp. 192, 260 (W.D. Mich. 1979) (holding that the Indians' right to fish "is not a static right" and "is not limited as to species of fish, origin of fish, the purpose of use or the time or manner of taking"), modified, 653 F.2d 277 (6th Cir.), cert. denied, 454 U.S. 1124 (1981); *Lac Courte Oreilles Band* v. *Wisconsin*, 653 F. Supp. 1420, 1430 (W.D. Wisc. 1987) (holding that the Tribes are not confined to "fishing methods their ancestors relied upon at treaty time" and concluding that "[t]he method of exercise of the right is not static" and, therefore, the Tribes may take advantage of improvements in the fishing techniques they used at treaty time).

dependence" of the Indians on each species of shellfish. See also UPOW Pet. 27-29. Again, however, the Tribes reserved their preexisting, plenary "right of taking fish." That right naturally includes the ability to adjust their fishing practices to accommodate changes in fish populations over time.[8]

Despite petitioners' claims to the contrary (*e.g.*, Wash. Pet. 19-21), the court of appeals followed the allocation methodology set forth in *Fishing Vessel*. In that case, the Court held that "an equitable measure of the common [fishing] right should initially divide the harvestable portion * * * into approximately equal treaty and nontreaty shares, and should then reduce the treaty share if tribal needs may be satisfied by a lesser amount." 443 U.S. at 685; see also *id.* at 686 n.27 ("[s]ince the days of Solomon, [a 50-50] division has been accepted as a fair apportionment of a common asset").[9] The court of appeals' determination here that tribal needs cannot be "satisfied by a lesser amount" of naturally occurring shellfish (Pet. App. 32-33 & n.11) was factbound and correct.[10] Indeed, the court's approach was, if anything,

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[8] It is beyond dispute that fish resources in the treaty areas are far below treaty time levels (see *Fishing Vessel*, 443 U.S. at 668-669), largely because of extensive non-Indian fishing and other activities. It also bears repetition that, at treaty time, the Tribes relied extensively on shellfish for commercial purposes and for their own consumption.

[9] By way of example, the Court suggested that a lesser amount might be appropriate where a tribe "dwindle[s] to just a few members" or "find[s] other sources of support that lead it to abandon its fisheries." 443 U.S. at 687.

[10] The court of appeals properly upheld the district court's determination that the Tribes "lag significantly behind other residents of the State of Washington in their overall standard of living." Pet. App. 33. That factbound issue warrants no further review. There is also no merit to UPOW's contention (Pet. 28-29) that the district court failed to consider casino revenues in its analysis. The court of appeals concluded that, even if it had considered tribal income from casino operations, it would have

less generous to the Tribes than they might have hoped, since the court excluded the Tribes both from any share of the harvest covered by the shellfish proviso (see *infra*), *and* from any share of the portion of shellfish on *natural* beds whose existence is attributable to the efforts of non-Indians. See *id.* at 33-34.

b. The private landowner petitioners contend (Alexander Pet. 12-19; UPOW Pet. 14-19) that, because the Treaties grant the Tribes the right of taking fish "in common with" all citizens, they do not authorize the Tribes "to harvest shellfish on private tidelands from which the general public is lawfully excluded" (Alexander Pet. 19). That claim is also foreclosed by this Court's decisions.

In *Winans*, the Court rejected the argument that "the Indians acquired no rights but what any inhabitant of the Territory or State would have," explaining that such a result would constitute "an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more." 198 U.S. at 380. More than 70 years later, the State of Washington argued in *Fishing Vessel* that the Stevens Treaties guaranteed the Tribes nothing more than an "equal opportunity" to harvest fish in competition with the increasing numbers of non-Indians. See 443 U.S. at 676-677 & n.22. This Court again rejected that argument, which it considered virtually a "matter decided" by *Winans* and other decisions (*id.* at 679), and reaffirmed the Tribes' substantive right to an equal share of the harvestable fish (*id.* at 685):

> It is absolutely clear, as Governor Stevens himself said, that neither he nor the Indians intended that the latter "should be excluded from their ancient fisheries," and it is accordingly inconceivable that either party

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concluded that the district court's findings were not clear error. Pet. App. 33 n.11.

> deliberately agreed to authorize future settlers to crowd the Indians out of any meaningful use of their accustomed places to fish.

Id. at 676 (citation omitted).[11] More generally, the Court held, "[t]he contingency of the future ownership of the lands * * * was foreseen and provided for" (*id.* at 680) when the Stevens Treaties were signed; the Treaties provided for that contingency both by entitling the Tribes to take a fair share of the harvestable fish and by granting them access to private lands for that purpose. *Id.* at 680-681.[12]

Petitioners argue that those prior holdings are inapplicable because the fish at issue in those cases were anadromous fish rather than shellfish. But that distinction, to the extent that it has any significance here at all, cuts against petitioners' position. Under the line of decisions culminating in *Fishing Vessel*, the Tribes' right of access to private property indisputably "include[s] the right to use private tidelands for beach seines, tidal impoundment traps, stake nets and reef nets" (see Pet. App. 24), as well as a right "of erecting temporary buildings" for curing the fish (*Winans*, 198 U.S. at 381; see also *Seufert*, 249 U.S. at 197-199). By contrast, the decisions below sharply limit the Tribes' right of access to private property within the same "usual and

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[11] Petitioners suggest (Wash. Pet. 7; Alexander Pet. 2; UPOW Pet. 14) that only about 50% of the State's tidelands are privately owned. That is simply incorrect. The evidence at trial, much of it provided by the State's own witnesses (see, *e.g.*, S.E.R. 337- 338, 572-573; see also *id.* at 999-1002), confirms the courts below were correct in finding that the "vast majority" of tidelands are now in private hands. Pet. App. 12, 73.

[12] Petitioner UPOW suggests (Pet. 10) that the Treaties themselves bar the Tribes from entering private lands, citing a provision of one of the Treaties giving the Tribe a right "to reside upon any land * * * claimed or occupied" by non-Indians "if with the permission of the owner or claimant." But the right of the Tribes to "reside" on privately owned land is, of course, not at issue here.

accustomed" fishing grounds for purposes of taking shellfish. For example, the Tribes are generally limited to five days of shellfish harvesting per year (Pet. App. 38); they may not gain access to privately owned uplands except where they demonstrate an inability to gain access "by boat, public road, or public right of way" (*id.* at 37-38, 146); and they must comply with a variety of important notice, surveying, and time-of-day restrictions (*id.* at 125-133). The right to make such minimal incursions on private property is included within, and pales in comparison to, the much broader rights of access repeatedly affirmed by this Court.

Petitioners also seek to distinguish shellfish from other kinds of fish on the theory that the common law deemed shellfish to be part of the property on which they are located. That argument is both incorrect on its own terms and irrelevant. First, under the overwhelming weight of precedent at the time of the Treaties, natural shellfish beds were part of the common fishery and were therefore subject to harvesting by the public. See Pet. App. 25, 61-64; see also *Smith* v. *Maryland*, 59 U.S. (18 How.) 71, 74-75 (1855); *Martin* v. *Waddell*, 41 U.S. (16 Pet.) 367, 413-414 (1842). Moreover, whatever the status of the common law then or now, this Court has repeatedly held that non-Indians may not rely on "property law concepts" to defeat the Tribes' right of taking fish under these federal treaties. See, *e.g.*, *Fishing Vessel*, 443 U.S. at 682. For that reason, UPOW's reliance (Pet. 19-21) on several early 20th century Washington Supreme Court decisions regarding state law property issues is misplaced. Indeed, those decisions do not address the federal rights guaranteed by the Stevens Treaties.

Petitioners' reliance (*e.g.*, UPOW Pet. 14-15) on *Antoine* v. *Washington*, 420 U.S. 194 (1975), and *Oregon Dep't of Fish & Wildlife* v. *Klamath Indian Tribe*, 473 U.S. 753 (1985), is equally without merit. In *Antoine*, this Court did not even address whether the Indians were entitled to hunt on

private land under the agreement at issue there, because that issue was not presented by the case. 420 U.S. at 207-208 n.11. In *Klamath*, the treaty language at issue, unlike the language of the Stevens Treaties, confirmed that the tribal usufructuary rights in question were meant to exist only "within the limits of the reservation." 473 U.S. at 766; see *id.* at 766-768. Nothing in that decision calls into doubt this Court's seven decades of consistent interpretation of the Stevens Treaties. For similar reasons, there is no merit to petitioners' reliance (*e.g.*, Alexander Pet. 14-15) on various lower court decisions involving other Tribes with different usufructuary rights under different treaty language. See, *e.g.*, *Lac Court Oreilles Band* v. *Wisconsin*, 760 F.2d 177, 182 (7th Cir. 1985); *Mille Lacs Band of Chippewa Indians* v. *Minnesota*, 952 F. Supp. 1362, 1378 (D. Minn.), aff'd, 124 F.3d 904, 933-934 (8th Cir. 1997), cert. granted, No. 97-1337 (June 8, 1998) (argued Dec. 2, 1998). Indeed, in *Mille Lacs* the Tribes at issue did not seek access to private lands that were not open to members of the public, and in *Lac Court* the Tribes similarly did not assert rights of access to private lands as a general matter.

Relying on *Winans* and *Seufert*, petitioners separately contend (UPOW Pet. 16-17; Alexander Pet. 15-18) that the Tribes should be required to demonstrate historic use of a given trail before following it over private lands. Neither *Winans* nor *Seufert* supports that argument. The degree or type of evidence necessary to establish a right of access was not at issue in either case. Rather, both cases stand for the settled proposition that Indians have a right of access over private property to effectuate their treaty fishing rights. Although there had been open and notorious use of the private land at issue in *Winans* and *Seufert*, the Court in each case noted that fact only in passing and did not treat it as a necessary basis for its holding. See *Seufert*, 249 U.S. at 197-199; *Winans*, 198 U.S. at 381-384. To the contrary,

Winans broadly states that the Treaties "fix[] in the land such easements as enables the [fishing] right to be exercised." *Id.* at 384. Moreover, in *Fishing Vessel*, the Court reaffirmed that the Tribes' right "to cross private lands" was a right that "non-Indians do not have," 443 U.S. at 676 n.22, a characterization that forecloses petitioners' suggestion that the right is confined to easements acquired under ordinary common-law principles through open and notorious use over time. Indeed, the dissent in *Fishing Vessel* recognized that the right is "a 'servitude' upon all non-Indian land" (*id.* at 701 (Powell, J.)), which "entitle[s] the Indians to trespass on any land when necessary to reach their traditional fishing areas" (*id.* at 703 (Powell, J.)).

Finally, the Tribes' right of access to privately owned uplands is substantially limited by the requirement, which the court of appeals affirmed (Pet. App. 37-38), that the Tribes first "demonstrate the absence of access by boat, public road, or public right of way" (*id.* at 37). Thus, the extent to which exercise of these treaty rights will actually result in the Tribes' access to private uplands is circumscribed and uncertain at this time.

c. Petitioners further contend (Wash. Pet. 22-27; Growers Pet. 20-28; Alexander Pet. 20-23) that construing the Treaties to permit the Tribes to take shellfish in their "usual and accustomed" fishing grounds would violate the "equal footing" doctrine. That argument is also foreclosed by this Court's precedents.

Under the equal footing doctrine, the federal government is presumed to have held tidal and submerged lands under navigable waters in trust for future States, such that, upon achieving statehood, each State assumes sovereign title to those lands on an "equal footing" with the established states. See *Montana* v. *United States*, 450 U.S. 544, 551 (1981); see also *Shively* v. *Bowlby*, 152 U.S. 1 (1894). The court of appeals found (Pet. App. 20-23) that the doctrine is inappli-

cable here because the fishing rights at issue are aboriginal rights reserved by the Tribes rather than federal rights once held and then conveyed by the United States, and because application of the doctrine has focused on actual ownership of lands, and ownership is not at issue here. Petitioners take issue with each of those rationales, but the short answer to their "equal footing" claim is that this Court has already squarely rejected it, as the court of appeals also explained (*id.* at 22).

As discussed above, this Court held in *Winans*, as it would reaffirm in *Fishing Vessel* decades later, that the Treaties entitle the Tribes to "cross[]," "occupy," and indeed "erect[] temporary buildings" on private land for the purpose of exercising their traditional fishing rights, and that the Treaties "impose[] a servitude upon every piece of land," public or private, for the exercise of those rights. 198 U.S. at 381. The Court specifically repudiated a challenge based on the equal footing doctrine, explaining that "surely it was within the competency of the Nation to secure to the Indians such a remnant of the great rights they possessed as 'taking fish at all usual and accustomed places.'" *Id.* at 384. There can thus be no challenge here to the "servitudes" the Tribes enjoy on private land in their "usual and accustomed" fishing places. And it makes little sense to suggest that the equal footing doctrine draws distinctions among the kinds of fish the Tribes may harvest in those same places.[13]

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[13] Petitioners seek to escape the precedential significance of *Winans* by suggesting (*e.g.* Wash. Pet. 25) that, under the shellfish proviso, the Tribes' right to take shellfish is more temporary than their right to take other kinds of fish. That argument, however, depends on a challenge to the case-specific determination by both courts below (Pet. App. 27-28, 69-73) that the proviso was written to secure continued protection for the Tribes' traditional right to take shellfish from natural beds. See *infra*. That determination distinguishes this case from *Crow Tribe* v. *Repsis*, 73 F.3d 982 (10th Cir. 1995), cert. denied, 517 U.S. 1221 (1996), in which the

2. The only significant issue in this case that is not controlled by existing legal precedent is the meaning of the shellfish proviso, which bars the Tribes from taking shellfish from "any beds staked or cultivated by citizens." The court of appeals' interpretation of that proviso was correct, and the precedential significance of that interpretation is limited to this case, because no similar language appears in any other treaty of which we are aware. Further review is therefore not warranted.

a. After conducting an exhaustive evaluation of the proviso's drafting history and purpose (Pet. App. 58-78), the district court interpreted the proviso to exclude the Tribes from artificial shellfish beds but not from natural beds. *Id.* at 77- 78. The court found, among other things, that natural shellfish beds at treaty time were reserved by law for public use (*id.* at 61-64), that they "were almost never 'staked' or 'cultivated'" (*id.* at 65), that the treaty negotiators were familiar with industry practices in both the East Coast and in Washington Territory (*id.* at 65-66), and that they understood "natural" beds and "staked or cultivated" beds to be mutually exclusive categories (*id.* at 77-78). See also pp. 3-4, *supra* (describing historical practice of "staking" and "cultivating"). The court of appeals upheld that conclusion, reasoning that the district court's extensive analysis was "correct" (*id.* at 26); that a construction of the proviso excluding the Tribes from natural shellfish beds on private property would "effectively eliminate the Tribes' right to take shellfish under the Treaties" (*id.* at 27); that such a construction would thus "provid[e] 'an impotent outcome to

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treaty right at issue *was* designed to be temporary. See also *Ward* v. *Race Horse*, 163 U.S. 504, 515 (1896) (addressing "temporary and precarious" rights). Indeed, the *Repsis* court itself cited that factor as its basis for distinguishing the rights at issue in that case from the fishing rights reserved in the Stevens Treaties. See 73 F.3d at 991.

negotiations and a convention which seemed to promise more, and to give the word of the nation for more'" (*id.* at 27-28 (quoting *Winans*, 198 U.S. at 380)); and that it would "cast[] aside black-letter canons" of treaty interpretation (*id.* at 28).

The Growers (Pet. 18-19) and private landowners (see, *e.g.*, Alexander Pet. 23-26) argue that the court of appeals construed the phrase "any beds staked or cultivated" too narrowly. The relevant question, however, is what the treaty parties intended by the language they borrowed from shellfish industry usage at the time of the Treaties. The evidence introduced at trial concerning that language's meaning within the industry was not, as petitioners repeatedly suggest, confined only to the "intricacies of east coast state law" (Growers Pet. 19; see also Wash. Pet. 28; Alexander Pet. 25), but also included west coast practices as well, industry treatises, articles in the popular press, and the writings of the treaty negotiators themselves. Pet. App. 60-71. In addition, the lower courts considered the post-treaty conduct of the parties and correctly concluded that nothing in the post-treaty materials proffered by petitioners outweighs the "compelling evidence" (*id.* at 59) that the negotiators intended to exclude only artificial shellfish beds from the Tribes' shellfishing rights (*id.* at 74-75).[14]

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[14] UPOW claims (Pet. 22) that its interpretation of the shellfish proviso draws support from a letter written in 1905 by the Commissioner of Indian Affairs, who opined that lessees of tidelands containing natural clam beds could exclude treaty Indians from them. Pet. App. 211-213. As the district court correctly observed, the letter "has no relevance to the appropriate interpretation of the Shellfish Proviso," because the Commissioner based his determination *not* on the language of the proviso, but on an interpretation of the "in common with all citizens" clause of the Treaties. *Id.* at 76. That interpretation was rejected in *Winans* 45 days after the letter was written. See 198 U.S. at 379-382.

b. Petitioners argue that the court of appeals created a "conflict" with other circuits by deferring to some of the district court's predicate findings on the meaning of the shellfish proviso. See Growers Pet. 11-18; Wash. Pet. 27-29; Alexander Pet. 26-27. There is no such conflict, and the matter does not warrant this Court's review.

As an initial matter, the extent to which the court of appeals "deferred" to any of the district court's findings is unclear. Although the court did state that a "deferential standard" was appropriate for "the district court's findings of historical fact and its findings regarding the intentions of the parties' negotiators," it independently held that "the district court's reasoned analysis of the Proviso *is correct*"; it "adopted [the district court's] analysis as [its] own"; and it further explained that petitioners' interpretation of the shellfish proviso violates principles of treaty construction and "is totally inconsistent with the United States' avowed intention to preserve for the Indians their ancient fisheries." Pet. App. 26, 27 (emphasis added, internal quotation marks omitted). The court thus made clear that its holding did not turn on deference to the district court's subsidiary findings. For that reason alone, this case would be an inappropriate vehicle for addressing any question about the proper standard of review for appellate courts in resolving predicate factual disputes relating to treaty interpretation.

Moreover, there is no conflict between any aspect of the opinion below and the decisions from other courts of appeals upon which petitioners rely. See, *e.g.*, Growers Pet. 13-14. In none of those cases did the appellate court address any

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UPOW is also incorrect in asserting (Pet. 22) that the United States excludes treaty Indians from federal beaches (which in any event are not at issue in this lawsuit). The Tribes and the federal government have historically been able to work out arrangements for tribal shellfishing on federal tidelands. See, *e.g.*, S.E.R. 489-493.

dispute relating to the standard of review. Indeed, the interpretive issue in those cases did not rest on any facts in dispute, and they therefore did not involve any question of appellate deference to findings of fact. Rather, the decisions stand only for the undisputed proposition, which the court of appeals in this case explicitly endorsed (Pet. App. 16), that a treaty's ultimate meaning is subject to de novo review.

Finally, petitioners are plainly mistaken if they are contending, as they sometimes appear to be (*e.g.* Wash. Pet. 27), that appellate courts may never apply deferential review to *any* predicate finding of fact made by a district court in the course of treaty interpretation. Many kinds of legal determinations—from the construction of contracts to the voluntariness of confessions—rest in part on predicate factual findings, and it is undeniably appropriate for courts of appeals to review those findings deferentially. See, *e.g.*, *Ornelas* v. *United States*, 517 U.S. 690, 699 (1996); *Miller* v. *Fenton*, 474 U.S. 104, 112 (1985); Fed. R. Civ. P. 52(a).[15] Here, the parties disputed a variety of factual matters relevant to the meaning of the shellfish proviso, including highly fact-specific issues concerning the practices of the mid-19th century shellfish industry and the familiarity of individual treaty negotiators with those practices and the terms used to describe them. See, *e.g.*, Pet. App. 61-66. A court of appeals commits no error in deferring to a district court's findings on such issues. Indeed, in construing the

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[15] As this Court noted in *Fishing Vessel*, "[a] treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations." 443 U.S. at 675. In interpreting contracts, courts routinely treat the parties' intent as an issue of fact subject to deferential review. See, *e.g.*, *ATACS Corp.* v. *Trans World Communications, Inc.*, 155 F.3d 659, 665 (3d Cir. 1998); *Servicios Comerciales Andinos, S.A.* v. *General Elec. Del Caribe, Inc.*, 145 F.3d 463, 469 (1st Cir. 1998); *NRM Corp.* v. *Hercules, Inc.*, 758 F.2d 676, 682 (D.C. Cir. 1985); cf. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287-288 (1982).

fishing rights clause of the Stevens Treaties, this Court in *Fishing Vessel* deferred to, and relied on, the district court's factual findings regarding the understanding of the Indians and the United States at the time of treaty negotiations. See 443 U.S. at 666-668, 674-685.

3. The Growers (Pet. 28-30) and the Alexander petitioners (Pet. 27) contend that laches defeats the Tribes' assertion of shellfishing rights. That claim is without merit. Petitioners cite no decision of any court that is inconsistent with the disposition of their laches claim below (see Pet. App. 28). To the contrary, this Court has consistently rejected the application of laches against a Tribe or the United States when either brings suit to enforce Indian or federal rights. See, *e.g.*, *Board of County Comm'rs* v. *United States*, 308 U.S. 343, 350-351 (1939) (defenses based on delay in bringing claims such as laches are inapplicable to enforce Indian rights); *United States* v. *Minnesota*, 270 U.S. 181, 196 (1926); *Cramer* v. *United States*, 261 U.S. 219, 234 (1923); *Ewert* v. *Bluejacket*, 259 U.S. 129, 138 (1922); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 408-409 (1917). Indeed, neither the Growers nor the Alexander petitioners present any claim that laches bars the United States from bringing this suit in its sovereign capacity on behalf of the Tribes. For that reason alone, their laches claim is not properly presented, for it is entirely unclear how it would benefit petitioners if laches were applied to the Tribes' claims alone.

In any event, even if it were otherwise appropriate to consider the doctrine of laches in this context, petitioners' reliance on that doctrine would still fail on the facts of this case. The Tribes did not, as the Growers suggest (Pet. 29), "long ignore[]" their treaty rights. At treaty time, and for many years thereafter, "the Indians harvested the majority of the shellfish resource." Pet. App. 12.; see also *Fishing Vessel*, 443 U.S. at 675. As a result of increasing population

pressures as well as state laws and policies, including Washington's sale of the "vast majority" (Pet. App. 12) of its tidelands into private ownership, the Tribes were gradually displaced from the shellfish fishery, until it became necessary to institute this lawsuit. The Tribes do not seek compensation for any period of exclusion from treaty lands. Thus, any delay in the filing of this lawsuit has in fact inured to the benefit of the Growers.[16]

4. The Growers contend (Pet. 5-6, 9, 29) that the court of appeals' decision imperils their investments in their shellfish farms. That contention is immaterial to the meaning of these Treaties and in any event is highly overstated as a factual matter. First, the decision below confines the Tribes to a share only of those shellfish that exist "solely by virtue of the natural propagation of the species" (Pet. App. 34), and denies them all rights to any portion of the shellfish harvest that is attributable to the Growers' efforts (*id.* at 34-35). Similarly, the Growers are entitled to all shellfish on artificial beds, which are wholly excluded from treaty rights under the shellfish proviso. Therefore, because nearly all of the Growers' oysters and mussel beds are artificial, nearly all such beds are reserved to them.

Oysters and mussels constitute approximately 66% of the total value of shellfish commercially harvested from the Washington tidelands. See PL-988, Table 50. Thus, even if the existence of all other shellfish were attributed solely to natural, unaided propagation—an (incorrect) assumption that would obviously benefit the Growers—the maximum proportion of the shellfish value to which the tribes might be

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[16] Petitioner UPOW contends in passing (Pet. 19) that "all tribal claims were extinguished * * * because most of these Tribes were paid in full under the Indian Claims Commission for all previously uncompensated interests in lands." As the court of appeals determined (Pet. App. 29), that claim is without merit. See also Gov't C.A. Br. 80-83.

entitled from the Growers' properties is half of 34%, or 17%. Again, even that latter figure greatly overstates the impact that honoring the Tribes' treaty rights will have on the Growers, since many clams are the product of enhanced production techniques and are therefore excluded from the Tribes' treaty rights.

* * * * *

This Court granted certiorari in *Fishing Vessel*—even though there, as here, "the principal issue involved [wa]s virtually a 'matter decided' by our previous holdings" (443 U.S. at 679)—only "[b]ecause of * * * widespread defiance of the District Court's orders" and an ongoing and irreconcilable "conflict between the [Washington] state and federal courts" concerning the matters at issue (*id.* at 674). Here there is no such conflict, and there are no practical exigencies that would require this Court's intervention. On the basis of an enormous factual record, the lower courts have succeeded in bringing this case to a correct and fair resolution, under which the Tribes retain the fishing rights they were promised and non-Indians retain both a fair share of all naturally occurring shellfish and an absolute entitlement to every single shellfish whose existence is attributable to their efforts. No further review is warranted.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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In The
Supreme Court Of The United States

October Term, 1998

STATE OF WASHINGTON,

Petitioner,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE'S REPLY TO BRIEFS IN OPPOSITION

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A. Certiorari Is Necessary To Resolve Conflicting Methods Of Treaty Interpretation

The State of Washington's first question asks the Court to resolve a conflict between two different methods for analyzing the nature of off-reservation treaty rights to take natural resources. The paradigm advanced by the tribes (Respondents) and the United States (Respondents), and adopted by the Ninth Circuit, holds that a treaty securing a right of taking fish at all usual and accustomed grounds and stations reserves any fishery the tribes theoretically could have exploited at treaty time, regardless of whether they actually did so. This method of treaty interpretation conflicts with the paradigm followed by this Court and other courts that treaty rights are defined by proof of actual treaty time Indian activities. The Court should accept certiorari to resolve this conflict regarding the basic nature of off-reservation treaty rights.

1. Under the ruling of the Ninth Circuit:

> "'The fact that some species were not taken before treaty time—either because they were inaccessible or the Indians chose not to take them—does not mean that their **right** to take such fish was limited.'" *United States v. Washington* (*Shellfish* III), 157 F.3d 630, 644 (9th Cir. 1998) (quoting *Shellfish* I, 873 F. Supp. at 1430) (emphasis added); App. at 19.

According to the Ninth Circuit, these treaties secured rights to fisheries the tribes did not use or even imagine at treaty time.

2. The Ninth Circuit's decision conflicts with decisions holding that treaties secure the continuation of specific treaty time activities and that no treaty right exists when a tribe fails to prove that it is the continuation of a treaty time activity. *See United States v. Dion*, 752 F.2d 1261 (8th Cir. 1985) (*en banc*), *reversed in part*, 476 U.S. 734 (1986); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians*

v. Wisconsin, 758 F. Supp. 1262, 1269 (W.D. Wis. 1991).[1] In *Dion*, the court ruled that a treaty right to hunt did not include the right to hunt eagles for commercial purposes, because the Indians did not hunt eagles for commercial purposes at treaty time. The Ninth Circuit applied this same analysis. *United States v. Top Sky*, 547 F.2d 486, 487-88 (9th Cir. 1976). Similarly, in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, the court ruled that an off-reservation right to gather from the forest did not secure a right to harvest timber, because there was no evidence of treaty time timber harvesting.

Respondents attempt to distinguish *Dion* by arguing that the Indians in that case did not intend or understand the treaties to reserve the right of hunting eagles for commercial purposes. Tribes' Br. at 13; U.S. Br. at 13 n.7. This response illustrates the two conflicting paradigms in this case. How did the court in *Dion* know what the Indians intended and understood about limits to their hunting rights? The court looked at evidence of treaty time activity. The Ninth Circuit's approach is entirely different. Under the Ninth Circuit's ruling, whether a tribe historically exercises a particular right is irrelevant, because treaty time Indians had a hypothetical right to sell eagles, or to harvest timber, even though they did not choose to, or could not.

3. Respondents also cannot distinguish prior decisions interpreting the treaties at issue in this case. Until the decisions below, these treaties had been interpreted as securing the continued use of specific fisheries and specific places.[2] In

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[1] Although *Lac Courte Oreilles* is a district court ruling, it arises in the extensive Seventh Circuit supervision of off-reservation treaty rights of the *Lac Courte Oreilles* Indians.

[2] Similar rulings date back 100 years. *See Seufert v. Olney*, 193 F. 200 (E.D. Wash. 1911) (no evidence that site was traditionally used);

the original case defining the nature of the treaty right to salmon, the district court required each tribe to come forward with evidence of where they took salmon runs at treaty time. *United States v. Washington* (*Washington* I), 384 F. Supp. 312, 359-82 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). The district court established this as the method to define the scope of any treaty right to non-anadromous fish or shellfish, requiring "prima facie evidence" of the "**species taken at treaty times, where (usual and accustomed grounds), and by what tribes (who are entitled to exercise treaty entitlement)**[.]" *United States v. Washington* (*Washington* II), 459 F. Supp. 1020, 1038 (W.D. Wash. 1978).[3] The court later ruled there was no treaty right to certain herring fisheries when some tribes failed to prove they harvested from that fishery at treaty time.[4]

Similarly, this Court applied the method of analyzing actual treaty time fisheries in *Washington v. Washington State Commercial Passenger Fishing Vessel Association (Fishing Vessel)*, 443 U.S. 658, 678 (1979). The court affirmed equitable allocation to harvest half the salmon runs only after reviewing evidence of Indians exercising broad rights to take salmon at treaty time. This analysis of historic use would have been unnecessary under the Ninth Circuit's holding because

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United States v. Taylor, 3 Wash. Terr. 88, 13 P. 333 (1887), *enforced in* 44 F. 2 (C.C.D. Wash. 1890).

[3] Although the district court spoke in terms of species and places, the more common term is "fishery". "Fishery" is the word used to describe fishing activity in terms of "stocks", "species", and "habitats". *E.g.*, 16 U.S.C. § 1802(13) (Magnuson Act); Wash. Rev. Code 75.08.011(21).

[4] The district court found that although the Suquamish Tribe and the Swinomish Tribe once fished herring, they had not shown usual and accustomed places. App. at 165-66. The Squaxin Island Tribe and the Upper Skagit Tribe had not shown any treaty time herring fishing at any place. App. at 166.

salmon are fish, and Indian tribes had a theoretical right to make broad use of salmon runs at treaty time.

4. The Ninth Circuit's new rule presents significant problems beyond the fishing right at issue in this case. Nationally, there are off-reservation usufructuary rights that include fishing, hunting, taking of marine mammals, grazing, gathering of wild foods, and taking of forest products. When an off-reservation treaty right is not defined by treaty time Indian activities, both state powers and private interests may be displaced by unpredictable, springing tribal claims.

5. Respondents strive to convey the impression that certiorari is not appropriate because this is a "fact bound" case. In reality, this case presents the question of the proper method of interpreting the nature of off-reservation treaty rights to use natural resources. Both the district court and the Ninth Circuit rejected any factual analysis of historic deep water shellfish use, holding it was unnecessary under their view of the nature of treaty rights. Other cases have required proof of treaty time activity. This Court may squarely address whether the Ninth Circuit's ruling and its paradigm for off-reservation treaty rights is correct. No factual dispute prevents the Court from reaching this important question.

Furthermore, the record does not contain disputed facts. The parties simply draw different conclusions from the historic record. To the extent there is a dispute over deep water shellfish use in the record, it would be a matter for remand after resolving whether historic Indian use defines what fisheries are secured, and whether historic dependence affects the equitable allocation of those fisheries.[5]

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[5] Respondents claim that the State is ignoring evidence that treaty time Indians harvested the deep water shellfish species. However, the tribes' own archaeologist testified that the shellfish he found in some 1,000 archaeological sites were overwhelmingly comprised of clams, oysters,

6. Respondents argue that defining treaty rights in terms of historic Indian activities would impose a "technology limit". This argument is inaccurate. The State does not seek to limit how a modern tribal member continues participation in what the tribes recognize as "ancient fisheries". The State's point is that historic technology helps define what was an "ancient fishery".

Labeling historic Indian use of natural resources as a "species limit" or "technology limit" simply obscures the fundamental conflict over the nature of off-reservation rights. Under one set of cases, treaty rights to take off-reservation resources were specifically intended to secure the continuation of well-known activities of treaty time Indians. Under these cases, the court of equity protects the understanding of treaty time Indians without unnecessarily preempting the general laws of the states or the United States. The Ninth Circuit's ruling below presents a significant conflict with these prior cases, by holding that rulings about salmon fishing rights have created

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mussels, and other shellfish commonly gathered from intertidal areas, with almost no evidence of deep water shellfish. SSER 28-31. To answer a question by the Judge, he explained that "deep water" shellfish were rare:

> "[D]eep water [shellfish were obtained by the Indians] when they are washed in, **but that's a real small percentage** of the animals we're seeing in these [1,041 archaeological] sites." SSER 31 (emphasis added).

The State's petition acknowledged that one unique tribe, the Makah, showed evidence of harvests for sea urchins, although the trial court did not determine if the Makah showed any "usual and accustomed" places for taking urchins. State's Pet. at 5 n.3.

Respondents also argue that a court would be overcome by the difficulty of defining treaty rights in terms of treaty time fisheries. The simple response is that modern fishery management agencies control fisheries using user groups, locations, and specified fish and shellfish stocks, and a court defining historic fishing is equally capable of setting such boundaries and limits.

generic fishing grounds where tribes control half of all present and future fisheries.

B. Certiorari Should Decide If Equitable Allocation Of A Fishery Must Be Based On Historic Dependence On That Fishery

The State's first question also presents a fundamental conflict over the proper method to equitably allocate a fishery between treaty and non-treaty fishers. Respondents' claim that half of all fisheries must be allocated as a treaty share conflicts with this Court's decision in *Fishing Vessel*, which based the 50 percent allocation of salmon on the tribes' historic dependence on salmon.

1. The Ninth Circuit allocated half of the deep water shellfish, such as crab and shrimp, to the tribes even though they did not depend on these fisheries at treaty time. Respondents contend that this follows from the "first step" in equitable allocation, which they say divides all harvests into equal treaty and non-treaty shares. Tribes' Br. at 15-16; U.S. Br. at 18. In essence, they analyze the question of equitable allocation as if the State and the tribes are co-tenants over off-reservation fishing grounds, which ensures that tribes receive half of all fisheries.[6]

2. *Fishing Vessel* did not use a co-tenancy theory to allocate a tribal share of salmon runs. Instead, this

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[6] In passing, the tribes contend that arguments about equitable allocation are not preserved. The State pleaded there should be no rights to fisheries not taken historically (ER 13-23), putting the issue in the pre-trial order. ER 80-81. The State has repeatedly cited *Fishing Vessel* to preserve all equitable allocation arguments.

Significantly, the tribes make no argument that this Court cannot, on this record, decide whether the lower court should have examined historic tribal use and dependence on a fishery before granting half of that fishery to treaty Indians, or any other indicator that the State's allocation argument was not encompassed by arguments at trial and on appeal.

Court applied equity. The first step for equitable division is to determine if there is heavy historic Indian dependence to protect:

> "[The trial court] first concluded that at the time the treaties were signed, the Indians, who comprised three-fourths of the territorial population, **depended heavily on anadromous fish [salmon] as a source of food, commerce, and cultural cohesion**. . . . **Only then** did it determine that the Indians' present-day subsistence and commercial needs should be met, subject, of course, to the 50% ceiling." *Fishing Vessel*, 443 U.S. at 686 (emphasis added).

The State agrees that treaty time tribes were dependent on their salmon runs. Similarly, treaty time Indians depended on intertidal shellfish gathering in many places. Respondents, however, cannot deny that the exhaustive treaty time dependence on salmon runs is starkly different from the minimal use of shrimp, geoduck diving, off-shore crab, and other fisheries that had no treaty time antecedent.

3. This case clearly and directly presents the issue of what is the proper method of equitable allocation. Under the Ninth Circuit's view, a treaty right to fish, hunt, or gather automatically entitles the Indians to half of the natural resource. Under the analysis in *Fishing Vessel*, the Court exercises its equitable power to allocate to maintain the Indians' access to a fishery they historically depended upon.

4. The repercussions of the Ninth Circuit's ruling on equitable allocation of new fisheries are dramatic. Amicus State of Oregon shows how it invested millions of dollars to develop fisheries and processing techniques to take otherwise inedible whiting and make it a valuable natural resource. Amicus crab fishing associations confirm that their seasons have been cut in half or more in places. The Court should

resolve this question because it has a profound impact on all present and future fisheries.

C. The Ninth Circuit's Failure To Consider The Equal Footing Doctrine Denies Washington State Its Power To Control Use Of Its Tidelands

The State's second question asks whether tribal members may enter and take shellfish from tidelands that are cultivated or otherwise privately controlled. Respondents do not deny that the tribes ceded all right, title, and interest to lands outside reservations. The Ninth Circuit, however, interpreted the treaty to deny the State its power to permit cultivation or private harvest of shellfish, except in places where there is no so-called "natural bed" of shellfish. This imposes a permanent, vague servitude that affects thousands of properties and contradicts one hundred years of practical treaty construction.

1. The Ninth Circuit rejected any duty to interpret these treaties in light of the Equal Footing Doctrine and federalism purposes of the United States. Instead, the Ninth Circuit ruled that the Equal Footing Doctrine applies only to fee simple ownership claims to aquatic lands. In addition, the Ninth Circuit held the doctrine inapplicable to defining rights that Indians reserve in a treaty. The tribes and the United States do not deny that these rulings conflict with numerous decisions of this Court. U.S. Br. at 20; Tribes' Br. at 20.

2. Instead, the tribes and the United States argue that the short discussion of the Equal Footing Doctrine in *United States v. Winans*, 198 U.S. 371 (1905), as discussed in *Fishing Vessel,* controls. Neither *Winans* nor *Fishing Vessel* interprets whether the Shellfish Proviso preserved the future state's power to allow shellfish beds to be staked or cultivated to the exclusion of public or Indian shellfish gathering. Under the Equal Footing Doctrine, a court presumes that the United

States does not encumber future state control over and title to tidelands. That presumption is not overcome "unless the intention was definitely declared or otherwise made plain". *Montana v. United States*, 450 U.S. 544, 552 (1981). The Shellfish Proviso does not definitely state Congress' intent to diminish equal footing status. It states the opposite.

The conflict arising from the Ninth Circuit's failure to consider the proviso in its constitutional context presents an important question for certiorari, because it concerns fundamental state powers and affects thousands of properties sold or leased by the State. Respondents argue that the doctrine has no relevance to interpretation of the Shellfish Proviso, because the trial court interpreted the proviso to permanently preclude staking or cultivation on the tribes' traditional natural beds. Tribes' Br. at 21 n.24; U.S. Br. at 20 n.13. Citing the ultimate interpretation of the proviso as a reason to avoid examining the Equal Footing Doctrine is circular logic. The Ninth Circuit should have interpreted the Shellfish Proviso in light of the Equal Footing Doctrine to determine whether state power to lease and convey all natural shellfish beds is preserved.[7]

3. The best illustration of how the Ninth Circuit's opinion cannot be supported by *Winans* is to compare the contrasting arguments of the Solicitor General in the two cases. In 1905, the Solicitor General agreed with the State's current argument that treaties secure only specific fisheries and access rights to well known fishing places. Few lands would be subject to a servitude created by the treaty. The Solicitor General explained: "We are not seeking to impress a broad and

[7] At best, the argument that shellfish rights are permanent responds to the tension with the Tenth Circuit's holding that "temporary" Indian hunting rights do not survive statehood because of the Equal Footing Doctrine. *See Crow Tribe v. Repsis*, 73 F.3d 982 (10th Cir. 1995), *cert. denied*, 517 U.S. 1221 (1996).

vague servitude on all patented lands along the Columbia, but only a clear and limited one on this particular small tract." *Winans*, 198 U.S. at 373 (argument of Solicitor General). Off-reservation rights were "like a ripened prescription" for those particular famous fisheries and places. *Id.* at 374.

Today, the United States argues that *Winans* and *Seufert Brothers Co. v. United States*, 249 U.S. 194 (1919), "stand for the settled proposition that Indians have a right of access over private property to effectuate their treaty fishing rights". U.S. Br. at 24. This is the very same "broad and vague servitude" that the United States specifically disclaimed in *Winans*. This broad and vague easement is inconsistent with the equal footing presumptions that the federal government intended to preserve the future states' power over its aquatic lands. The Court should grant certiorari to decide when treaty rights were intended to preempt a state's sovereign power to determine future ownership and use of aquatic lands.

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